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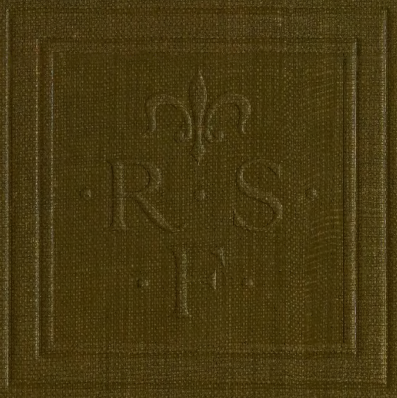

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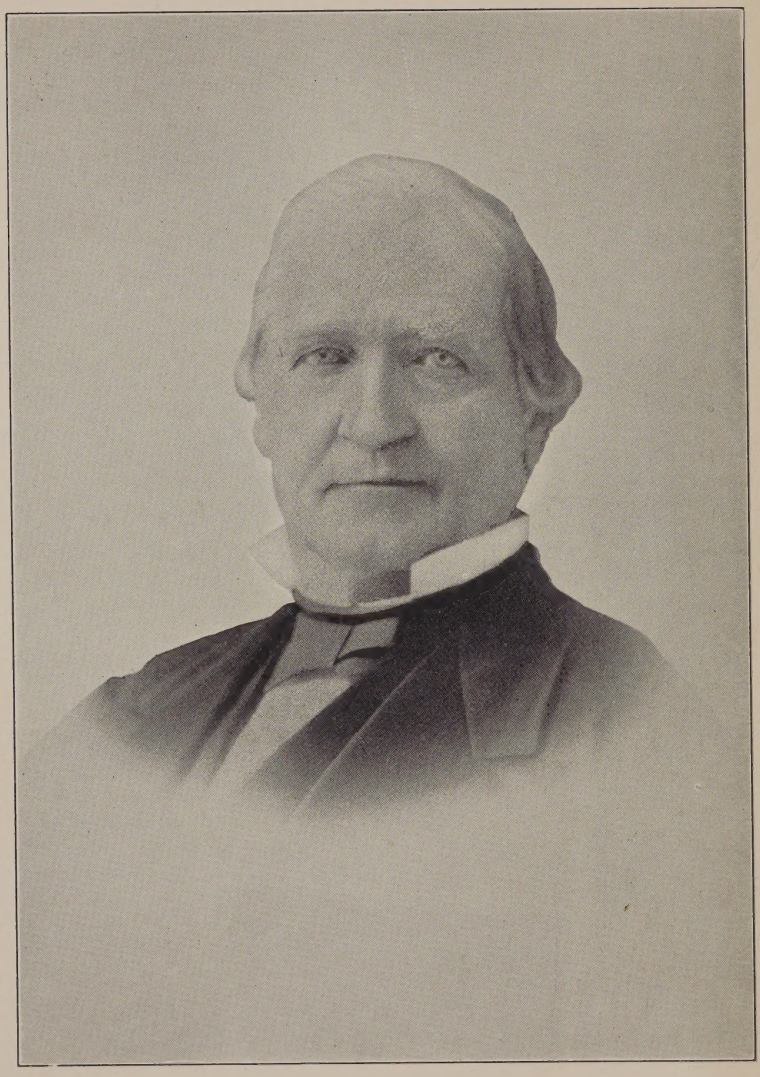

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CORRECTION AND PREVENTION

FOUR VOLUMES PREPARED FOR THE
EIGHTH INTERNATIONAL PRISON
CONGRESS

EDITED BY
CHARLES RICHMOND HENDERSON, PH.D. (LEIPSIC)
PROFESSOR OF SOCIOLOGY IN THE UNIVERSITY OF CHICAGO
COMMISSIONER FOR THE UNITED STATES ON THE INTERNATIONAL PRISON COMMISSION

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EDITORIAL INTRODUCTION

By CHARLES RICHMOND HENDERSON

IN the year 1905 at the meeting of the American (then "National") Prison Association at Lincoln, Nebraska, the late Dr. S. J. Barrows, then United States Commissioner on the International Prison Commission, and President of the International Prison Congress, requested the American Prison Association to appoint a committee "to co-operate with the government in making the necessary arrangements for the meeting." It was the duty of this committee to assist the Commissioner in making suitable arrangements for the entertainment of the delegates to the International Prison Congress in 1910. The following persons were appointed for this purpose: John L. Milligan, Cornelius V. Collins, Albert Garvin, Frederick Howard Wines, Robert W. McClaughry, Henry Wolfer, Frederick G. Pettigrove, John M. Glenn, with Charles R. Henderson as chairman.* This Committee was given power to enlarge its numbers and fill vacancies.

Dr. Barrows suggested to this general committee the formation of a special sub-committee to help him prepare several volumes to be called Souvenir Volumes and presented to the official delegates to the International Prison Congress; the purpose of these books being to exhibit as fully as possible the essential features and principles of American methods of dealing with crime and delinquents. It was proposed that the scope of this work should correspond to the four sections of the International Prison Congress,—criminal law, prison systems, preventive agencies and treatment of delinquent and neglected children. The following persons were appointed to constitute this sub-committee: Frank B. Sanborn, F. H. Wines, J. M. Glenn, with C. R. Henderson as chairman. Later, after giving very valuable and fruitful suggestions, Dr. F. H. Wines resigned from the committee and Mr. Eugene Smith was added. The following division of labor was finally accepted: Dr. Barrows was to have general editorial direction; several specialists were to be invited to prepare

* Proceedings of the National Prison Association, 1905, p. 304.

Volumes I and II; C. R. Henderson was requested to prepare Volume III, and Dr. H. H. Hart, Volume IV.

To the great satisfaction of the friends of the Congress, all anxiety about the expense of the undertaking was removed by the generous action of the Russell Sage Foundation, which offered to give $5,000 to pay the expenses of publication; the labor of the writers being given without pecuniary recompense, as a patriotic service.

The sad loss of our esteemed friend, Dr. Barrows, on April 21, 1909, made necessary several changes in the plans. He had already carefully worked out, in collaboration with the committee, the outlines of the work and had selected all of the writers; he had examined the first sketches to assure himself that conflicts and duplication would be avoided; then he passed away from us and we took up his task as well as we could.

The responsibility of the general editor then fell to the chairman of the sub-committee, who having been appointed by President Taft to succeed Dr. Barrows as United States Commissioner on the International Prison Commission on May 28, 1909, resigned as chairman of the general committee of the American Prison Association at its meeting in Seattle in August, 1909. Mr. C. V. Collins succeeded him.

It has been the purpose of all concerned to present in these volumes, with fidelity to truth, the most essential facts, without controversy and without boasting, and to interpret the historical movements treated so as to discover their genuine significance. Perhaps some important facts have been overlooked; perhaps being so near the events described the perspective has not always been duly regarded, or perhaps the personal convictions of the writers (all of them persons having strong convictions) may sometimes have over-emphasized particular arguments on disputed points; but at least an honest attempt has been made to put the reader in a position to form an independent judgment on the basis of all relevant facts and differing opinions. Many of the laws and activities and institutions described are in the stage of experiment; some of these will drop away and leave only negative results; but on the whole we believe that we have made a record of some permanent contributions to human welfare and progress in this series of volumes.

GENERAL ASPECTS OF OUR GOVERNMENT

All the papers of these four volumes are written by persons familiar with the relations of their topics to the working of federal, state and local governments in the United States; and there are certain facts that must be kept in mind in reading these papers.

The fundamental law of the land was originally derived from Great Britain, the Mother Country, and all our legal institutions to this day show traces of this origin, however much they have been modified to meet new and different conditions and problems. The Constitution of the Union was an instrument drawn up in the beginning of the Republic as an independent nation, to give a large framework for future development of legal and political institutions. Several important amendments were adopted at later dates. Such amendments are very difficult to secure and require long time to carry through the process of discussion and enactment. The method of amendment is too cumbrous for meeting emergencies and changed conditions, so that the more speedy and effective method of adaptation of old principles to new needs is judicial interpretation. Whatever the legal theory may be, the practical fact is that the Supreme Court finds in the Constitution no permanent obstacle to progressive measures, if these are persistently demanded, after thorough consideration, by the will of the nation. The fundamental law is thus far more flexible than might be supposed from the apparently rigid lines of the written Constitution. The preamble to the Constitution recites the origin, authority and purpose of government: "We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

An analysis of this instrument reveals the outline of the federal organization:

(1) A national legislature composed of a Senate and House of Representatives. The qualifications, privileges and duties of the members are carefully defined. (2) The executive power is vested in the President. His cabinet is simply advisory and is not responsible to Congress. (3) The judicial power is vested in one Supreme Court. In the amendments are set down important principles relating to criminal law.

There are 46 states, besides the territories of Alaska, Arizona,

Hawaii, New Mexico, the District of Columbia, the colony of Guam, the Philippine Islands and Porto Rico. A government for Porto Rico was established by the Fifty-sixth Congress. The Philippines are under a permanent civil government; Guam and Tutuila under governors; and the Isthmian Canal Zone is under a commission, all appointed by the President. The District of Columbia is governed by Congress through a commission.

The territorial limits of the United States extend into the ocean the distance of a cannon shot and the boundaries between the United States and countries adjacent are determined by treaties. The territorial limits of the states are fixed by charters, compacts and by acts of Congress admitting to the Union. The limits of counties are fixed by the acts of the state legislature. The following principles are of general significance:

The courts of the country can punish a person only for acts committed within its territorial limits, with certain exceptions relating to crimes committed on ships or in foreign countries. The jurisdiction of federal courts is determined by Congress, although where Congress has declared certain crimes without defining them the courts may seek a definition in the common law. Powers conferred on federal courts by Congress must be such as are authorized by the Constitution.

Generally speaking all persons who are within the territorial limits of the nation or a state are subject to its laws; certain exceptions are made with regard to foreign citizens.

THE CRIMINAL LAW

The criminal law consists of statutes which have been enacted by Congress or the legislature, and of the common law. The principles of the common law are expressly stated in court decisions and at this point the English common law has great influence, though without final authority.

Congress is limited in its power to define crimes and fix penalties by the Federal Constitution. The Constitution has given Congress power to provide for the punishment of counterfeiting and piracy. The state legislatures have inherent power to prohibit and punish any act unless the statute violates the state or federal constitution.

PENAL ACTS

Some states have adopted penal codes which, in certain cases, are intended to cover the whole law, so that no act is a crime unless it is expressly declared to be so; in others the code abrogates the common law only in relation to acts prohibited, leaving in force the common law where it is not expressly set aside.

For the development of the essential principles of criminal law in this country we refer at once to the able discussion by Mr. Eugene Smith, in this volume, as to a competent authority.*

We thus see the possibility of great confusion, perplexity and contradiction in the criminal law and in the modes of punishment established within the United States. The Federal Legislature, and the legislatures of all the forty-six states are constantly putting forth new statutes, while the courts of all ranks are interpreting and applying these laws in every part of the vast region. The consequence may be anticipated. The penalties for the same crime are different for each state. There is no great country which has tried so many experiments with the retributive principle. When it is asserted that a legislature is competent to measure the degree of guilt in the length of the punishment, this absurd assertion is contradicted by the facts before us. Dr. F. H. Wines, Dr. S. J. Barrows, Mr. Eugene Smith and others have given abundant illustrations of these necessary contradictions, and have drawn from them a strong argument for abandoning the attempt to give any approximate measure for retribution. They have shown that we must seek in the character and conduct of the criminal rather than in abstract definitions and penalties the amount of punishment necessary for social protection. Illustrations of these unequal penalties are given in this volume.

The definitions and conceptions of "justice" are changing under the influence of a more scientific analysis and a deeper appreciation of the value of human life. We are coming to see that "justice" must mean the condition of social welfare at a given time, the spirit and the method of furthering human life in all its elements of good and in all the members of the nation. The notion that "justice" looks merely to the past and demands a fair equivalent for the wrong done, will not bear calm and rational inspection. The ideal is not some remote condition which is utterly impracticable here and now, but a principle which can be made to regulate action at once, in this world, and among all the members of the common-

*See also: L'Organisation judiciare aux États-Unis, par Alf. Nerincx, 1909.

wealth. It is possible, at least for all practical purposes, to discuss rules of conduct which can be tested by results before all eyes. Justice, as we now see it, asks not for destruction or retribution,—a purely negative and fruitless demand,—but it wills positively just and upright character and conduct. The malefactor is to be transformed into a benefactor, or at least placed under conditions most favorable to produce this result.

The tendency to promote general well-being is the test of measures of law as of all other modes of action among men. By careful observation, with records in statistical form as far as possible, the effects of various measures on the individual delinquents and on the persons tempted to crime may be measured. The laws of influence, made clear by psychologists, teachers and directors of reformatories are reliable guides and may be trusted.

This practical conception of justice is at the basis of the movements toward reform of laws and prison methods throughout the civilized world, and of those which are described in these pages. The moment "good time" laws or rules were admitted there was a breach in the Chinese wall of the retributive theory of punishment; from that moment the admission was made that the conduct of the convict after conviction ought to have some effect on the time of liberation, on the length of the sentence. From that moment the ancient assumption that legislator or judge should attempt to measure out punishment was dead and a new and more reasonable principle came into play.

The discretion of the judge and his authority to be "lenient" was another door of entrance for the modern conception; the fact that "leniency" without supervision by agents of the court was in reality cruelty to the individual and dangerous to public order, revealed the necessity of providing probation officers, just as the defective results of absolute release on "good time" demonstrated the necessity for having parole officers and a system of conditional release.

The governors of states, under the pressure of politicians, attorneys and friends, tempted and urged to abuse their pardon power, discovered the arbitrary nature of the pardon power itself; and what Blackstone had praised was found to be dangerous and capricious. The governors besought the legislators to give them pardon boards to divide and dilute their responsibility,—a mere unprincipled makeshift without foundation in reason, supported only by tradition. It is not surprising that several governors became enthusiastic advocates

of the parole system, because it placed the responsibility on the shoulders of the convict himself, where it belongs, and introduced the principle that a man's freedom depends not on an act of grace but on his own disposition as shown in his habitual deeds.

Thus it will be seen that this movement toward a real "indeterminate sentence" has its sources in experience, and is the logical outcome of the obvious failures and contradictions of a theory of retribution.

All the improvements thus far brought about in the United States have their roots in the principle of social protection through educative agencies:—parental and industrial schools for reform; numerous preventive agencies and methods; probation of first offenders; parole for convicts who give reason for hope of reform; prolonged sentences for hardened criminals; colonies for the cure of habitual inebriates; reformatory methods for all; higher demands on prison officers made imperative by the higher requirements of an educative system as compared with those of a merely brutal repressive and retributive system.

Perhaps the so-called "indeterminate sentence" is popularly regarded as, in some sense, distinctive and central in the reforms of prisons and criminal law in the United States. It is sometimes said that the indeterminate sentence has been accepted universally in the United States and is maintained without opposition. This is far from the truth, and it is desirable that the truth should be known.

In the strict and legal sense of the word the indeterminate sentence—defined as a "sentence to reformation" and without limits in time,—has not been made legal by a single legislature.* In all states where a beginning has been made with the reformatory principle the maximum term of imprisonment is fixed by law for each kind of crime, and often the minimum period also. This is in no proper or exact sense an indeterminate sentence, and it is seriously confusing, as practice shows, to employ it, even though most of us qualify it by the term "so-called" indeterminate sentence. It might be well to reserve this expression to use accurately and truthfully when we finally secure what we on principle are striving hard to attain. But habit and custom are tyrannous; the term indeterminate sentence at least designates a hope, an ideal and a tendency; and, with the usual explanations we shall probably continue to use it, with all its defects. We shall not waste time quibbling over a

* This is shown by Judge Simeon Baldwin in his "rapport" to the International Prison Congress, 1910.

phrase. The substantial fact is that the American public has entered upon a new era of criminal law and the phrase indeterminate sentence is the watchword of the movement. From the beginning the members of the legal profession, and properly, as conservators of the rights of men against executive arbitrariness, have looked with suspicion on the undue extension of the powers of an administrative board in restraining convicts, even when on conditional parole. This antagonism has broken out in violent speech of heated controversy, and the parole law has been arraigned before the public as giving free and unjust control to the executive branch of government.

In the very first experiment, in the establishment of the Elmira Reformatory, New York, this antagonism of the legal profession was felt. The first draft of the law contained a provision for a really indeterminate sentence, and would have given power to the board of managers to keep a prisoner for life. This clause was stricken out, because it might have defeated the entire reformatory plan. Even the modified and limited power entrusted to the board of managers was not given without question. Mr. Scott cites the language of the report of the commissioners who selected the site of Elmira in 1869:

"Should it be thought that too much power is given to the board of managers and warden to determine whether reformation has taken place, the answer is that their decision is not to be arbitrary but based on some report of facts showing regular and satisfactory improvement."

But this answer has not hushed controversy among many lawyers who insist that giving such power to release or restrain is one which belongs to the courts and not to the executive or administrative branch of government. Possibly a way can be found for meeting this objection on solid ground, by a slight modification in the organization and procedure of courts, and by the specialization of certain courts which may have continuous control of prisoners on parole.

It has sometimes been suggested that the *trial* court should have the power to control the paroled convicts and order their conditional release, their discharge or remand. But to this it seems to be a valid answer that after trial the judge and jury who have convicted the prisoner must lose all connection with his life and be ignorant of his conduct under discipline, which must be considered in relation to parole and discharge. Furthermore, the trial courts are scattered over a wide area in the larger states and there could be no unified and impartial administration of the parole system. The decisions would be contradictory and capricious, with all the marks of injus-

tice and unfairness. In the case of minors sent to state reform schools the interference of trial judges, which is legal in Illinois, frequently works to demoralize the discipline of the school, and is sometimes quite without guidance from knowledge of the situation.

Judge John Franklin Fort, then justice of the Supreme Court of New Jersey, afterward governor of the state, before the National (American) Prison Association in 1902 made a powerful plea for the reformatory principle. He said of the indeterminate sentence:

"Given the right conditions and an impartial, non-partisan tribunal to control discharges, I would favor its application to all offenders. I would go still a step further. I would have neither the minimum nor the maximum term fixed by statute, and, possibly, not by the sentencing court. The proper way to cure those who are really criminal is as you cure other diseased persons; namely, keep them under treatment until they are cured, or at least, so nearly cured that they may be discharged safely." After this strong assertion of the reformatory principle he calls in question the present system of administration and proposes a substitute. "A board of managers of a penal institution is not always the safest body with which to leave the liberty of the prisoner. Even though it be constitutional and otherwise legal, to confer upon the managers of a penal institution* the power of discharge, is it not of doubtful wisdom under our form of government? Is it not a matter of serious concern whether a "court of discharge" should not exist in each state, having judicial power of inquiry and action? Would not both the public and the prisoner feel safer in the hands of an impartial tribunal in which was lodged the ultimate decision as to discharge; a tribunal with power to hear the whole matter and with the sole power to remand into custody for cause? Should not a man have the right to be heard on the question of his remand into custody? I would not take from the managers their power of initiative as to release. I would require all applications for release, before expiration of term, to come through them but, if they refused to permit an application for parole after a reasonable term of service, that the court might consider it, I would give the prisoner the right of review and of a hearing before the discharge court." He recommends that a judge should preside over such a court. "In the interests of absolute impartiality and assured public confidence—which are essential to

* Even when the parole board is not identical with the administrators of a prison it is still a part of the executive and not of the judicial organization of the state.

the permanence of the system—it seems clear that some such protection should be thrown around it."

Thus far a learned and far-sighted judge.

It is true that no American state has established a law which may be properly called an indeterminate sentence law. But it may fairly be claimed that many states have made great and rapid advance in introducing reformatory methods, and that the merely vindictive and retributive notion of punishment has been rejected by the most enlightened minds of the nation. In the treatment of the insane, of neglected children, and of delinquent youth, the re-educative purpose is dominant. In dealing with inebriates and others of imperfect mentality and will, the idea of cure and re-education is influential. The suspension of sentence and probation applied to adults gains friends and advocates. It remains only to show that a vast number of offenders are defectives in some degree to secure the extension of the same methods to them.

The discussions of facts and experiences found in these four volumes reveal a weak place in the administration of criminal law, not peculiar to the United States. We have no organization for the thorough and consecutive study of offenders. The trial by summary process is swift, superficial and bears on a few minor points. The trial in case of serious crime is usually only too prolonged, but has no scientific method of finding out the life history of the accused. The court papers sent to the warden of the prison give him scant information on which to base his plans of education and reformation. Indeed, the assumption of the court and law is, perhaps in a majority of cases, actually contrary to facts,—the assumption that the sane man did the criminal act of his own free will. Much time is spent to little real purpose in proving or disproving "intent." Some of the most progressive judges have learned a lesson from the experience of the juvenile court where the procedure is free from these unproved and false assumptions, and where a frank, patient and sometimes expert study is made of the nature, habits, life history and surroundings of the accused.

It begins to dawn on some of the judges that ordinary adult criminals are little more than youth; untaught, ignorant, perverted by their education, without the power to make moral distinctions clearly and sharply, and trained in social neglect to a false attitude toward law and order. Once establish this fact in the legal mind and we shall extend upward the methods which have already proved so fruitful with minors. Because we are too hasty, rapid and impatient

with the half-shaped creatures who throng our courts of summary jurisdiction we are compelled to do our work over again—sometimes fifty or two hundred times. If we could persuade legislators, lawyers, judges and police that the present reckless, thoughtless method is sheer waste and tends simply to increase criminality, we might be able to establish colonies equipped for serious treatment of a vast number of the anti-social class. At this point America needs to make an earnest study of such colonies as those of Merxplas and Witzwil.

The metaphysical dogma of measured retribution for guilt clouds the judgment and blinds learned men to the real situation, even obstructs the efforts put forth already to take firm hold on dangerous delinquents and keep them under control until they can voluntarily walk in the way of rightness. In our most advanced juvenile courts we have the model;—a physician and a trained psychologist study the immature young person, and with the aid of the probation officers who know the home, lay before the judge all the data necessary for his choice of methods. This is plain common sense. That same judge, sitting in a "criminal" court, the next hour, has before him a young fellow who happens to be only one day over seventeen years of age, and the procedure becomes instantly a century behind modern science,—learns nothing from experience, forgets nothing of precedent. Good law becomes a synonym of bad method. Meantime the "Black Maria" moves like a shuttle back and forth between court and bridewell, full of the same unreclaimed rounders. If courts were free to decide according to real facts and not compelled to decide on unfounded assumptions, they would halt this procession and select at least a part of the helpless victims of vicious habit to recover their real "free will." The short sentence for this class is just as bad in our country as in any other and complaints have been sounded from unprejudiced and experienced citizens of all nations and states. The evidence collected and interpreted in these essays ought to help correct the vision of administrators of law and responsible framers of legislation. The establishment of scientific methods of studying all accused persons would force upon public attention some of the worst absurdities of a merely retributive and deterrent theory of criminal law.

THE ORDER OF DISCUSSION

In the first volume we have told the story of the development of thought in the United States by reciting the facts in biographical

and historical form; we have shown how typical enlightened men, reflecting on the evils and abuses of the age and on the rational order and the criminal law, came to certain conclusions about fundamental principles. We have been exceedingly fortunate in securing for this historical sketch men whose memories are documents, the very primary sources of history; Mr. Sanborn and Mr. Brockway were influential in the first Congress at Cincinnati in 1870, and Dr. F. H. Wines, with a mastery of his theme gives a touch of filial admiration to his narration and interpretation. And who could have been chosen for the article on criminal law so properly as Mr. Eugene Smith, himself learned in the noble science of law, President of the renowned Prison Association of New York and identified with the progressive movement toward a more humane and effective administration of the law? Other leaders and prophets of a past generation are mentioned with praise and their chief contributions are characterized.

A brief biography of Dr. S. J. Barrows has been added, as all must confess to be appropriate. To the European members of the International Prison Commission, who hold him in affectionate and reverent esteem, this contribution of our gifted young journalist, Mr. Paul U. Kellogg, will be especially welcome.

To the second volume a number of the best representatives of the American prison and reformatory administration have contributed. Their papers may be regarded as the sincere and reliable expression of convictions and purposes which promise to control the future. They are men of long experience, and the fact that in a country where changes are so frequent and political appointments so uncertain, they have stood at their posts long enough to acquire professional skill and effect genuine reforms, gives promise of the near triumph of the "merit system" over the "spoils system" which has done our country so much harm. They are not the only men of this worthy class, but they are types of the kind we prefer and mean to have in office the country over.

Of the third volume, whose preparation was undertaken at the request of Dr. S. J. Barrows, it is not proper for the writer of the introduction to say more than is contained in the title, Preventive Agencies and Methods. It is, however, only justice to acknowledge the help of numerous specialists who generously and patiently furnished materials for its pages from their laboratories of social service. The names of the creditors are mentioned usually in connection with their works. The attempt was made to describe and interpret the

"social policy" which is taking more definite shape in this country, from the standpoint of defense against all forms of anti-social conduct.

The author of the fourth volume on the treatment of delinquent and neglected children and youth has become known everywhere as a specialist in the best methods of helping homeless and neglected children. For many years he was secretary of the Board of Charities in Minnesota and then built up the Illinois Children's Home and Aid Society to be one of the most effective agencies of its kind in the land. As Secretary of the National Children's Home Society his wisdom, tact and skill have extended the usefulness of that national federation and gradually improved its methods. It is not probable that any really significant method could escape his attention, nor any abuse or error find aid and comfort from his pen.

We are grateful to many foreign writers who have visited our institutions and honestly sought to represent things as they are, and to interpret all sympathetically. Their cheer has encouraged us, their criticisms have made us more alert, their praises have been welcome. Probably their exposures of our mistakes have been most profitable of all.

At the same time Europe needs also to see how our methods look to those who are responsible for them, who are actually in the harness and are facing the problems as strangers do not. It is well to let the man speak who can tell us why he did not choose some course which to outsiders seems better but might be impossible under our circumstances.

We take this occasion to offer the cordial greetings of the members of the various societies interested in the social treatment of crime and delinquents, to the official delegates to the International Prison Congress, whom it is our privilege to meet on the soil of our beloved country. They are welcome among us. To them, first of all, we offer these volumes as a souvenir of a visit which brings to us great delight and profit, and which will long be remembered by the friends of prisoners and prison reform as an inspiration to do better work. In this story they will find much to criticize; the faults of a rapidly growing country whose development in material wealth has outrun its legislation and its institutions of culture; but we trust they will also find here a powerful and advancing movement to correct recognized evils, to promote order and security and to further general enlightenment. When they point out our defects, we are sure that this will be done with their customary courtesy and kindness, and that the severest criticisms will be made palatable by their appreciа-

tion of the spirit in which we have ventured on bold but promising experiments. If we fail we shall bear the burden and the cost; if we succeed the world will thank us for the trial.

ORGANIZATIONS FOR THE STUDY OF CRIME

For many years the American Prison Association has brought together the wardens, physicians and chaplains of prisons and reformatories, the representatives of state boards and interested students; and the discussions of this body, published in an annual volume, represent the best thought of practical men in the field in our country.

The National Conference of Charities and Correction approaches the subject rather from the side of prevention and education of the young; but it has also published valuable papers on prison science and criminal law.

The American Institute of Criminal Law and Criminology was organized in Chicago in 1909, in connection with the commemoration of the fiftieth anniversary of the founding of the law school of the Northwestern University. This Institute has already begun the publication of its Journal, whose initial number is dated May, 1910.

The following paragraphs by the editor-in-chief, Professor James W. Garner, make clear the motives and scope of the Institute and of its organ:*

"The American Institute of Criminal Law and Criminology is an outgrowth of the National Conference on Criminal Law and Criminology held in Chicago in June, 1909. The idea of a conference representing the various classes interested in the problems connected with the administration of punitive justice, including the treatment of criminals, was a happy conception of the law faculty of Northwestern University, and the holding of such a conference was adopted as an appropriate way of celebrating the fiftieth anniversary of the foundation of the law school of that institution. It was indeed a unique and fitting method of commemorating an anniversary of this kind, coming as it did at a time when there is an awakening of interest in legal reform and a crying need for co-operative effort among lawyers and scientists. The conference was composed of about one hundred and fifty delegates representing the various professions and occupations concerned directly or indirectly with the administration of the criminal law and the punishment of criminals, and included

* Journal of the American Institute of Criminal Law and Criminology. Vol. I, 1, pp. 2–5. (May, 1910.)

members of the bench and bar, professors of law in the universities, alienists, criminologists, penologists, superintendents of penal and reformatory institutions, psychologists, police officials, probation officers and the like. Delegates attended from every section of the country and the conference was a very representative gathering of those either actually concerned with the administration of the criminal law or interested in its problems as students and scientists. In character and purpose the conference was entirely without precedent in the history of the United States. It represented the first instance of co-operative effort among those interested in a better system of criminal justice, and marks, we venture to assert, the beginning of a new era in the history of American criminal jurisprudence. The conference afforded an excellent opportunity for the exchange of ideas among lay scientists and lawyers, and a sincere effort was made to reach a common understanding on certain points concerning which there has been a variance of opinion. Although the idea of such a gathering was new to America it was an old one in Europe, where congresses of criminologists have frequently been held for the promotion of criminological science and the consideration of practical problems connected with the administration of criminal justice. In Europe the value of co-operation among lawyers and scientists in promoting improvement in the criminal law and in methods of criminal procedure has long been recognized.

"An elaborate program covering almost every problem of criminal science was prepared for the Chicago conference mainly from the list of topics suggested by the delegates, and altogether it constituted a remarkable program of constructive effort looking to judicial and penal reform. For the systematization and dispatch of the work of the congress the delegates were divided into three sections, to the first of which were referred all topics relating to the treatment (penal and remedial) of criminals; to the second, those relating to the organization, appointment and training of officials concerned with the administration of punitive justice, and to the third, those having to do with criminal law and procedure. To the conference as thus organized one hundred and thirty-five topics were submitted for consideration. They included such questions as the indeterminate sentence, rehabilitation, procedure of juvenile courts, treatment of accused persons under detention, indemnification for wrongful detention, the employment of prisoners, bureaus of identification, probation and parole, the insanity plea, public defenders, the selection and treatment of jurors, means of increasing

the effectiveness of the jury system, the unnecessary multiplication of criminal laws, the examination of accused persons, the simplification of pleading, the need of efficient agencies for collecting and publishing criminal and judicial statistics, restrictions on the right of appeal, reversals for technical errors, enlargement of the power of the judge, the constitution and procedure of municipal courts, laboratories for the scientific study of criminals, the individualization of punishment, the use of medical expert testimony, and many others. Realizing the impossibility of dealing adequately with such a variety of questions the conference wisely decided to restrict its deliberations to the consideration of a small number of topics which are to be made the subjects of investigation by committees and upon which reports are to be presented at the next conference. Among those topics were: (1) an effective system for recording the physical and moral, hereditary and environmental conditions of offenders; (2) the most effective methods of probation and parole for adult offenders; (3) the indeterminate sentence; (4) the organization and training of pardon and parole boards and the correlation of such boards with one another and with the courts; (5) the practicability of establishing commissions of specialists for giving expert testimony; (6) the possibility of unifying state and local courts so as to diminish the cost of transcripts, bills of exception, writs of error, etc., in accordance with the suggestion of the Committee of Fifteen of the American Bar Association; (7) the simplification of pleading in criminal cases and the elimination of technical errors. A committee was also appointed to investigate and report on the methods of criminal procedure in Europe and particularly in Great Britain, where the administration of justice is frequently asserted to be a model of efficiency and dispatch. Dean John D. Lawson of the University of Missouri School of Law, and editor of the American Law Review, and Professor Edwin R. Keedy, of Northwestern University Law School, as members of this committee, are now in England studying British criminal procedure, this mission having been undertaken with the approval and good wishes of President Taft, who is a great admirer of the English system and deeply interested in the outcome of the proposed inquiry. These gentlemen, it is understood, will be joined by other members of the committee at an early date and the result of their investigations will be awaited with interest by all those who desire impartial and first-hand information regarding the methods by which the administration of criminal justice in England has been brought to such a high degree of efficiency.

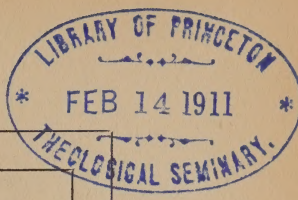
"An encouraging feature of the Chicago conference was the practical unanimity among lawyers and laymen alike that certain of our rules of criminal procedure and penal methods are antiquated, inadequate and unworthy of the high standard of civilization that we have attained in other respects, and should be modified in the interest of justice and social security.

"The conference adopted resolutions calling attention to the popular dissatisfaction with the results of our present methods of administering criminal justice; declared that reliable and accurate information regarding the actual administration of the criminal law was necessary to efficient legislation and administration; appealed to Congress to provide through the agency of the Census Bureau for the collection of full and accurate criminal and judicial statistics covering the entire country; and urged the enactment of legislation by the states, requiring prosecuting attorneys and magistrates to report to some state officer full information regarding crime committed within their jurisdictions and the punishment of offenders. Recognizing the desirability of making readily accessible in English the more important treatises on criminology published in foreign languages, steps were taken looking toward the translation and publication of such treatises, to the end that the principles of criminal science may be more generally studied and the criminal law improved. Finally, impressed with the advantages of uniting the efforts of lawyers, criminologists, sociologists and all others in the cause of a better criminal law, the conference resolved to effect a permanent national organization, to be known as the American Institute of Criminal Law and Criminology, whose purposes shall be to advance the scientific study of crime, criminal law and procedure, to formulate and promote measures for solving the problems connected therewith, and to co-ordinate the efforts of individuals and of organizations interested in the administration of certain and speedy justice. Mr. John H. Wigmore * of Chicago was elected president of the new organization and it was decided to hold the next meeting in Washington in October, 1910, in connection with the International Prison Association. The proceedings of the Chicago conference will be published for distribution among the members."

The organization of this Institute and the establishment of the Journal are the most significant events in the development of a really scientific study of the social treatment of crime in this country.

* Professor Wigmore, Dean of the Northwestern School of Law, deserves highest honor for the initiation of this enterprise.

C. R. Henderson. Correction and prevention. 1.



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PRISON REFORM

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CORRECTION AND PREVENTION

FOUR VOLUMES PREPARED FOR THE
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TABLE OF CONTENTS

PAGE

I. Historical Introduction 3
By Frederick Howard Wines, LL.D.

Declaration of Principles Promulgated at Cincinnati, Ohio, 1870 39

II. E. C. Wines and Prison Reform 64
A Memoir by F. B. Sanborn

III. The American Reformatory Prison System 88
By Z. R. Brockway

IV. Possible and Actual Penalties for Crime 108
By Frederick H. Wines

V. Samuel June Barrows 123
By Paul U. Kellogg

VI. Gen. Rutherford B. Hayes 140
By W. M. F. Round

VII. Biographical Sketches 145
Francis Lieber 145
Theodore W. Dwight 150
Edward Livingston 151
Dorothea Lynde Dix 158
Ellen Cheney Johnson 159
Gardiner Tufts 159

INDEX 161

LIST OF ILLUSTRATIONS

	Facing page
E. C. Wines	*Frontispiece*
Theodore W. Dwight	16
John L. Milligan	24
Count Sollohub	32
Front cover of a Japanese book on Prison Reform	36
Back cover of the same book	37
F. B. Sanborn	64
Richard Vaux	70
A. G. Byers	78
Ellen C. Johnson	86
Z. R. Brockway	90
Gardiner Tufts	98
Frederick H. Wines	110
Samuel J. Barrows	124
Rutherford B. Hayes	140
Francis Lieber	146
Edward Livingston	152
Dorothea L. Dix	158

PRISON REFORM

I

HISTORICAL INTRODUCTION

By FREDERICK HOWARD WINES, LL.D.

THE remarkable progress made in criminal law and prison reform, both at home and abroad, since 1870—the date of the Cincinnati Prison Congress—justifies the characterization, by Count Sollohub, of America as "the home of penitentiary science." That eminent statesman, director of the house of correction in Moscow, said also, speaking of Russia, "The idea that the same system can be applied indiscriminately to all countries is an idea incapable of realization. . . . It results that, while preserving the immutable principles of justice, the penitentiary system of each country should maintain its distinct physiognomy." This he denominated "the application of the principle of nationality."

In the preparation of this series of volumes, the principle of nationality, thus defined, has been ever kept in mind. Our foreign friends will find in them much that is inapplicable, or impossible of adoption or imitation, in countries differing widely from the United States in many ways. A young nation, comparatively free from the entanglement of precedent and prejudice, with popular, democratic institutions, may have gone faster and farther in reducing theory to practice than may seem desirable to a more conservative people; but after all, the test of experiment is experience.

The most complete and authoritative compendium of American belief with reference to all the elements that enter into the prison question is the "Declaration of Principles," which was adopted by the National Prison Congress of Cincinnati. It was formulated by Dr. E. C. Wines, but slightly, though not materially, modified by the committee to which it was referred for revision. Every section

of this paper was separately voted upon by the Congress. It is reprinted at the close of this article.*

Professor C. R. Henderson, who succeeds the lamented Dr. Samuel J. Barrows as president of the International Prison Congress, has assigned to me the congenial task of tracing the genesis of this famous Declaration in the mind of my father.

No man that ever lived would be less inclined than he to claim the credit of having originated ideas which had floated for centuries through the minds of many men in many lands. When, in 1862, he became the secretary of the New York Prison Association, he knew no more about crime and criminals than any intelligent man the vicissitudes of whose life have not brought him into contact with either. Eight years later, he was the acknowledged leader of leaders in prison reform throughout the world. The study of his career, interesting in itself, cannot fail to shed light upon the history of a movement that is in the highest degree characteristic of modern civilization.

The remarkable impulse given, in the latter half of the nineteenth century, to the cause of prison reform in the United States, is chiefly attributable to three men, of whom two—Messrs. F. B. Sanborn and Z. R. Brockway—survive to rejoice in the abundant harvest from seed planted in what then appeared to be sterile and unpromising soil. Dr. Wines has long been "where the wicked cease from troubling." Dissimilar as were these three in temperament, experience, and habits of thought, their fundamental agreement as to the nature of the changes demanded in criminal law and its administration, and their mutual regard and affection, so united them in purpose that they constituted a threefold cord not quickly broken.

The New York Prison Association was the youngest of three similar organizations. Between the other two—the Philadelphia and the Boston prison discipline societies—a bitter controversy was waged for many years over the question whether the Pennsylvania system (isolation of the convict by day and night) or the Auburn plan (isolation by night only, and compulsory silence in association) was preferable. That issue no longer agitates the American mind. Echoes of the controversy still reach our ears from across the sea, but in the New York reports it is scarcely mentioned. They are filled with denunciation of political control of prisons, and attacks upon the con-

* See page 39.

tract system of convict labor. In New York, and in other states as well, though not in all, these were at that time crying evils; and they were attended by their natural sequence, unnecessary severity of discipline, as it affected the amount and character of disciplinary punishment.

This is a painful subject to discuss, and it ought not, for obvious reasons, to be here dwelt upon at length. Some allusion to it cannot be avoided, since the starting-point of Dr. Wines' labors in behalf of a better system was his hostility to the system which stood in the way. It is difficult to discuss this older system fairly and in such a way as to convey no false impression to the reader's mind. Every successive stage of social evolution is of necessity transient and transitory; it may be contrasted with what went before, or with what follows. From the former point of view, each is an advance. Thus it has been truly said, that the history of civilization has been characterized by no single step in advance so radical as the institution of human slavery as an alternative for the massacre of captives taken in battle. The feudal system prepared the way for constitutional government. Without the legal fiction of corporate personality, few of the great enterprises of our own times could have been carried to successful completion. But the time arrived when feudality and slavery became stenches in the nostrils of those who saw and felt the burden of the wrongs perpetrated in their name. Something analogous has occurred in the evolution of the American prison system.

For instance, the centralization of control of the state prisons of New York, in 1847, partly at the instance of the New York Prison Association, was an advance. The prison inspectors of that state are believed to have constituted the first central board of administration of state institutions, of any class, in the United States. The introduction of productive and profitable convict labor into American prisons, even under the contract system, was a vast improvement on the compulsory association in idleness which characterized their former administration; and it may even be said to have been one of the chief roots of modern prison reform. As to disciplinary punishments in prisons, they are essential to the order and security of these establishments; the refusal of prisoners to perform the tasks assigned them is of course one principal occasion for such punishments.

It should also be said, by way of caution against misapprehension, that political appointments are not necessarily bad appointments. In a free country, which depends for its very existence upon the action of political parties of some sort, it is impossible wholly to

divorce the conduct of public affairs from political considerations. The attempt to do so would be unwise, and it would be futile. It must not be imagined that the prison inspectors, or even the prison contractors, were worse men than the average citizen—less intelligent, more corrupt or more cruel. Nevertheless, the system as it existed in New York about the time of the Civil War was very bad.

Perhaps no better statement of the influence of political control upon prison discipline has ever been formulated than that found in the testimony of Gaylord B. Hubbell, warden at Sing Sing. "The inspectors are nominated by political conventions, and elected by party votes. The party in power claims all the patronage to be dispensed in the prisons, and that patronage is used irrespective of the qualifications of persons applying for and appointed to office. The board of inspectors has the appointment of all the officers in the prisons. Whenever the majority of the board is changed from one political party to another, it is the practice to remove nearly all the officers, and fill the vacancies so made with others, who in most cases have had no experience at all in prison management. The subordinate officers are frequently appointed without having ever been seen by the inspectors, and solely on the recommendation of politicians. When a new inspector comes in without changing the political character of the board, he usually claims a certain share of the patronage by a redistribution of offices. The list of officers of any one prison, being taken up, is carefully canvassed, and it is generally found that if considerations of personal or political friendship alone prevailed all would be retained. But the changes must be made, and some principle must be found on which it can be done. The principle usually adopted is that of removing the officers who have served the longest, till the requisite number of vacancies has been made. These vacancies are then filled by the nomination of the new inspector. This system of political appointment disturbs the whole arrangement of the prisons, by taking away their best and most experienced officers and replacing them with untried and not infrequently worthless men. . . . On one occasion, when a number of removals had been made on party grounds, I peremptorily declined to be responsible for the safety of the prison unless the inspectors reversed their action. . . . The changes are so constant, and the tenure of office so short, that the best men will not become candidates; and even though an officer may possess good natural abilities, he will lack the indispensable quality of experience."

The chaplain at Sing Sing testified that in eighteen years he had served under nine different wardens.

Under the contract system, in the words of Dr. Theodore W. Dwight, "Convict labor becomes substantially slave labor, with many of its concomitant evils. Its rule is the same; the largest amount of work for the smallest return." The objections to that system may be tersely stated, as follows:

(1) The farming-out of governmental rights and powers to private parties is contrary to public policy. What the government undertakes to do, it alone should do. The presence of the contractor in the prison leads to divided responsibility.

(2) The financial interest of the contractor is a selfish interest. The prison wishes to sell its labor at a high rate; the contractor desires to buy it at the lowest possible price. The state wants a fair division of the profits of the establishment; the contractor cares little whether the state makes or loses money on the deal, if he can enrich himself.

(3) The political connections and power of the contractor are often such as to enable him to dictate the selection of the managers and warden of the prison. The tenure of his position, under contract, is more secure than theirs, under election or appointment. It therefore not infrequently happens that he becomes the real head of the prison.

(4) The internal economy of the prison, under the contract system, is apt to be shaped, if not with exclusive reference, yet with a predominant reference, to pecuniary results.

(5) The system is incompatible with proper regard to the reformation of prisoners. The New York law of 1847 declared the reformation of the prisoner to be one of the ends sought in his incarceration. That law was far in advance of popular sentiment; it was little more than a counsel of perfection. The prevailing opinion in the community, as one of the New York judges well phrased it, seemed to him to be "that offenders against the law should be caught, condemned, imprisoned and punished at the smallest expense. Improvements in prison discipline, as connected with judicious state policy, and with considerations applicable to the plea of humanity or the precepts of religion, do not appear to enter into the thoughts of most of our citizens." In a report of a visit to Sing Sing by a committee of which Dr. Francis Lieber was a member, it is said: "The opinion seems to prevail among the officers, that efforts to reform are incompatible with discipline." Before a special com-

mittee authorized to inquire into the management of the prisons, the physician of the Auburn prison testified: "I have served under five different administrations. During that time, the main object of them all, as far as I can judge, has been to make the prison pay its way, and earn a surplus if possible. I think there has been a desire on the part of those who have governed it, for the improvement of the prisoners; but there has been little faith in the reformation of the criminal class, and consequently little effort put forth directly to that end." The clerk of the same prison said: "Reformation cannot be made the chief design, with the contract system in operation; that system, by the very law of its being, sets itself too directly and strongly against such a purpose." The chaplain at Sing Sing said: "Reformation is made a very secondary matter in the management of this prison. The public demands that institutions of this kind, in this state, should be made to pay their way, and if possible earn a surplus, or come as near this point as may be; and the gentlemen who administer the affairs of this prison, both inspectors and officers, aim to gratify the public in this respect."

Against the retention of this system the New York Prison Association waged relentless war.

In 1866, a joint resolution was adopted by the legislature, which conferred authority upon the executive committee of the Association to appoint a commission of their own members, which should have, "in addition to the power now possessed by them of examining on oath all prison officers in actual service," the right to "invite any former prison officers of the state, and any officers now or heretofore connected with prisons of other states, to appear before them," in order that the commission might take sworn testimony regarding "the management of the prisons of New York and the general subject of prison discipline and government."* One of the main results of this special inquiry was to bring into bold relief the evil effects, as they were known to the present and former officers of New York prisons, of the contract system of labor, in connection with the political control of these institutions. The interrogatories put to the witnesses upon the stand were searching, and the replies given by them were fearlessly frank. Among other admissions, the fact was clearly brought to light that under that system corrupt collusion between the prison guards and the contractors' men is possible, and that where it exists it is most demoralizing. Warden Hubbell was

* The report of this commission is signed by Theodore W. Dwight, E. C. Wines, John H. Griscom, F. W. Ballard, John A. Bryan, and Edmund Coffin.

asked, "How did the system of overwork originate?" He replied: "The system in Sing Sing had no formal or designed beginning; it grew up gradually, and I may say almost imperceptibly. The contractors received special permits to give the prisoners tobacco, and sometimes medicines. The prisoner in return, as an act of gratitude, would do work beyond his required task. Further permits were afterwards received by the contractors to give the prisoners some little delicacies on public holidays. This stimulated a desire on their part for further indulgence. They would intercede with contractors' foremen to bring them various articles of food privately, for which they would pay money* which they managed to secrete about their persons when they came to prison, or which they had received from friends at their periodical visits. But some prisoners do not have money, and could not do this; consequently they would offer to pay for these things in overwork. The foreman seized upon this as a favorable opportunity for making some money by bringing in contraband articles and selling them to convicts at exorbitant prices. This system gradually enlarged its dimensions, until little stores, almost, were formed inside the prison, which were daily replenished from the village groceries." This testimony should be read in connection with that offered by an ex-keeper in the prison at Auburn: "These contraband articles are, I think, usually sold at an advance of not less than 400 per cent on what the same could be obtained for on the outside. . . . Where the state receives fifty cents per day for a convict's labor, and his labor is worth to the contractor one dollar, if he does half a day's work over his assigned task, thus earning for the contractor a dollar and a half, and the contractor pays him twenty-five cents for his extra work, the difference between seventy-five cents and one dollar and fifty cents will be divided between the contractor and the keeper. A keeper has stated to me that he received more from the contractors than he did from the state in the shape of salary. . . . A contractor can allow overwork or not, at his discretion. . . . Those who allow it, permit only certain men to do it. . . . Contractors will sometimes prohibit men from doing overwork, as a means of punishing them. They thus assume to exercise, and in fact do exercise, discipline within the prison. . . . There is a rule requiring money earned by overwork to be paid to the keeper or the clerk, but it is constantly evaded,

* A former warden of Sing Sing prison said that he had no doubt that, if all the money hidden away by the inmates could be reached in any way, "five thousand dollars could be picked up there any day."

and the money is paid directly to the convict; with it he buys the contraband articles referred to in a former answer."

The brutality of the administration of the state prisons of New York, when Dr. Wines first made their acquaintance, was revolting to a man of his sensibility and good sense. I shall not dwell upon it at length. It is enough to say that the abuses practised were so great, that the legislature was twice compelled to intervene for their suppression: first by prohibiting the use of the lash, and afterwards, in consequence of the death of a prisoner at Sing Sing from the effect of a shower-bath, it also forbade the punishments of ducking, showering and the yoke, also known as crucifixion. These cruelties grew naturally, and almost inevitably, from the alliance between greed for office and greed for gain, which exerted so malign an influence upon the organization and operation of the old system, now (happily) only a memory.

All the opponents of the system agreed that the only way to clear the ground of this unsanitary rubbish was to secure the adoption of a constitutional amendment divorcing the prisons from the politicians. In the autumn of 1866, the people of the state voted to hold a convention for the purpose of revising the constitution, and elected representatives to membership in it. The New York Prison Association prepared the draft of an article on prisons and submitted it to the convention, accompanied by a memorial which was in substance an argument and a prayer for its incorporation into the fundamental law.* This article as originally drawn and presented provided for the appointment by the governor of a board of five governors of prisons, with power to appoint and remove (for cause) all state prison officials, and to visit and inspect all institutions for the reformation of juvenile delinquents and the prevention of crime. Its relations to the county jails and penitentiaries were left to the determination of the legislature. The committee on prisons, to which this paper was referred, reported a substitute providing for the appointment of a single superintendent instead of a board of governors, "and otherwise differing materially from the plan proposed by the association." One member of the committee made a minority report, favoring that plan. Dr. Wines was instructed to use his best efforts to conciliate the convention to the measure. He was at the time confined to his

* The memorial was signed by Theodore W. Dwight, William F. Allen, Francis Lieber, John Stanton Gould, John H. Griscom, Gaylord B. Hubbell, and E. C. Wines. Judge Allen was the author of the article, "which was variously amended by Mayor Hoffman, Dr. Lieber, and the Honorable Charles J. Folger," before receiving the endorsement of all the gentlemen named.

room by a broken leg, and could do no more than address a letter to the president of the convention* on the subject, which accomplished its aim. The article as adopted was almost identical in substance with that drafted by Judge Allen; but the word "managers" was substituted for "governors," provision was made for a secretary of the board, and the wardens were authorized to appoint all officers other than the clerk, chaplain and physician, and to remove them at their pleasure. In 1869, the people rejected the proposed constitution, including of course this article with the rest.

In 1876, however, a vote was separately had on a proposed amendment to article five, section four, which was adopted. This amendment was in the following words:

"A superintendent of prisons shall be appointed by the governor, by and with the advice and consent of the senate, and hold his office for five years unless sooner removed; he shall give security in such amount and with such sureties as shall be required by law for the faithful discharge of his duties; he shall have the superintendence, management and control of state prisons, subject to such laws as now exist or may hereafter be enacted; he shall appoint the agents, wardens, physicians and chaplains of the prisons. The agent and warden of each prison shall appoint all other officers of said prisons, except the clerk, subject to the approval of the same by the superintendent. The comptroller shall appoint the clerks of the prisons. The superintendent shall have all the powers and perform all the duties, not inconsistent herewith, which were formerly had and performed by the inspectors of state prisons. The governor may remove the superintendent for cause at any time, giving to him a copy of the charges against him and an opportunity to be heard in his defence."

The protracted struggle was at an end, and responsibility in prison management was henceforth insured. There remained the important and difficult work of reconstruction, to which Dr. Wines addressed himself with characteristic vigor and ability.

There always have been, and probably always will be, two opposing theories as to the nature of government current in the world —in the family, in the church, and in the state. The ideal of those who hold to the one is submission to authority, implicit obedience; of those who hold to the other it is individual freedom and responsibility. Can the will be trained? or must it be broken? Is the force which moulds an untrained will, like that of the child, or which

* William A. Wheeler, afterward Vice-President of the United States during the Hayes administration.

brings a perverted will into harmony with law (human and divine) material or spiritual? Nowhere has the conflict of sentiment here indicated been more palpable than in the history of the effort to suppress crime. The criminal is a man with a weak, an abnormal, or a perverted will. Shall we deprive him of the power of resistance? or shall we seek to develop in him the power of self-control? That is the problem of the prison.

Corporal punishment is the application of physical force; an endeavor to coerce the spirit of a man through arguments addressed to his body alone. It is an appeal to his lower nature, to his fears; its tendency is to make of him a coward and a brute. It is irrational and ineffectual, in the vast majority of instances. It is a last resort, when all other means fail to produce the desired result. Incompetent men are far more apt to fly to it than are the brave and the intelligent. A prison governed by force and fear is a prison mismanaged, in which hope and love, the two great spiritual, uplifting, regenerating forces to which mankind must ever look for redemption, are asleep or dead.

When, therefore, the employment of physical pain as a stimulant to righteous living is forbidden, the question at once arises, what motive must be stirred into activity? Hope is the antithesis of fear. Why not try the effect of rewards upon the prisoner? Rewards, as truly as punishments, appeal to the inextinguishable principle of self-interest in his breast. The negative pole of a battery repels; the positive pole attracts. Teach him that if wrongdoing is sometimes pleasant, the only road to happiness is by doing right. Let him learn this lesson in the school of personal experience.

So thought and felt Dr. Wines and his friends. They rejoiced for a time in the introduction into the prisons of the system of overwork, because they seemed to see in it an inducement to convicts to labor for their own benefit and that of their families. It appeared to them to open a door of hope for the future to men who were before without hope. They thought that it would obviate the need for so great severity in the discipline of the prisons. As it was carried on in New York, on the contrary, it was the source and occasion of new and unlooked-for ills. Its application was too limited and too unequal. It was the cause of intense jealousy on the part of men who did not enjoy a privilege arbitrarily accorded to their fellows in misfortune, no more capable, no more deserving than they. The introduction of money into the prisons, where it was directly paid to the overworker, led to surreptitious contempt for the rules by which they

were ostensibly governed. The money itself was largely wasted. The family of the prisoner got very little of it, if any. Much of it was spent in betting on the elections. It was paid out in the vain hope of purchasing influence as a means of securing a pardon. A large percentage of it went into the pockets of the keepers and of the contractors' men, in return for illicit favors and indulgences. Prisoners were continually scheming and manœuvring to secure a transfer from a shop in which no money was paid for overwork into some other, or into a shop in which their earnings would, they believed, be greater. The contractors' men often played tricks designed to reduce the earnings of the prison under a contract, in order to admit of larger earnings by overwork, by which they themselves would pecuniarily benefit.

When the actual results of the system became apparent, the Prison Association changed its attitude somewhat. It still believed in allowing to prisoners a share of their earnings, but upon a different plan. Instead of giving to a favored few an uncertain share of the earnings of the contractor by this method of payment, never of what overwork was really worth, but always in accordance with the terms of an individual agreement in which the convict invariably got the worst of the bargain, it desired to see every man in the shops employed "from bell to bell," and to have a fund created, to consist of a fixed percentage of the amount due to each contractor, for distribution to all the inmates of the prison on some equitable basis, taking into account the diligence and good conduct of each prisoner, on the one hand, and the value of the product of his labor, on the other. It finally succeeded in this endeavor.

But if men are influenced by the hope of gain, much more is the average prisoner influenced by the desire to regain his freedom. Visions of a possible pardon haunt his dreams. He is perpetually on the watch for an opportunity to make his escape. It was accordingly a long step in advance, in the direction of humanity and good order in prisons, when the commutation acts began to be passed by state after state.

The abbreviation of terms of sentence imposed by the courts, as a reward for good conduct while in prison, was first embodied, so far as is known, in a New York statute of 1817, which conferred authority upon the prison inspectors to release, at the expiration of three-fourths of his term of sentence, any convict sentenced to imprisonment for not less than five years, provided that he could produce a certificate from the principal keeper showing that he had behaved

well, and that the portion of his net earnings set aside and invested for his personal account had amounted in all to not less than fifteen dollars per annum. Dr. Wines says of this law that "it remained a dead letter on the statute-book—a monument at once to the wisdom of the legislature that enacted it and the folly of the state that neglected to enforce it."

Nearly twenty years later, in 1836, Tennessee made it the duty of the governor, whenever the conduct of a prisoner had been exemplary and unexceptionable for a whole month together, to commute his term of imprisonment for any period of time not exceeding two days for each and every month that he should have so conducted himself.

Another twenty years had elapsed when, in 1856, Ohio granted a deduction of five days in each month during which any prisoner "shall not be guilty of a violation of any of the rules of the prison, and shall labor with diligence and fidelity."

It is a noteworthy circumstance that these were original and independent acts, not copied from one another. But the example of Ohio at once provoked imitation. Statutes drawn on similar lines were passed by other states in rapid succession, as follows: In 1857, Iowa and Massachusetts; in 1860, Wisconsin; in 1861, Michigan and Pennsylvania;* in 1862, New York and Connecticut; in 1863, Illinois; in 1864, Oregon and California; in 1865, Missouri and Nevada; in 1866, Maine; in 1867, New Hampshire, Minnesota, Kansas and Alabama; in 1868, New Jersey, Vermont and Rhode Island. In Missouri, for faultless conduct maintained for eighteen years, even a life prisoner was entitled to his release. Warden Haynes, of Massachusetts, regarded the passage of the commutation act by that state as "the most important step in prison discipline that has been taken in this country in the last forty years."

Before the war of 1861–65, the United States maintained a penitentiary at Washington, D. C. It was needed for use as a military prison, so that in September, 1862, the government contracted with the authorities of Albany county, New York, to receive federal prisoners and care for them in the Albany penitentiary. In the absence of a federal commutation law, the prisoners transferred to Albany from Washington were at a disadvantage in comparison with those committed by the state courts. The same was true of federal prisoners generally, who were serving sentences in prisons owned and

* In Pennsylvania, the act was held by the supreme court, upon technical grounds, to be unconstitutional.

controlled by the states. The federal government had no prisons of its own in which to confine them. In November, 1866, a federal prisoner in Sing Sing wrote to the United States district attorney for the southern district of New York, asking him to secure his release, on the ground that he was entitled to the benefit of the state commutation act. This letter was referred to the executive committee of the New York Prison Association, which deputed two of its members to proceed to Washington and intercede with the President for the exercise by him of executive clemency on behalf of all federal prisoners serving time in any state prison.* President Johnson at once issued an order, in which he pledged himself to "extend to them the same clemency and abatement of time, upon the same terms, as provided for the convicts under sentence of the courts of the state." The Association then secured the introduction of a bill in Congress, giving to federal prisoners the benefit of the commutation law of the state, whatever it might be, in which any such prisoner was confined. In 1867, a substitute measure was enacted granting a deduction of one month in each year in which no charge for misconduct is sustained against him.

The operation and effect of these laws has been most happy.

It would, nevertheless, be futile to imagine that any system of rewards can do more than conciliate the good will of a prisoner and enlist his co-operation with the authorities placed over him in carrying out their plans for the maintenance of order, and possibly for his own improvement. The purpose of the prison is the reconstruction of the prisoner, which is a positive work and demands positive measures for its achievement. He has proved himself to be a menace to social order and security. He regards society as his natural enemy. He must be convinced that the state is his best friend, and persuaded to respect and obey its laws.

When Dr. Wines became the secretary of the Prison Association, among the duties assigned him were these: "To carry on an extended correspondence both in our own country and Europe with gentlemen connected with the administration of penal justice, to collect and examine reports of penal institutions at home and abroad, to inspect and examine prisons, to make himself familiar with the doings of other organizations similar to our own and with the whole range of penal literature."

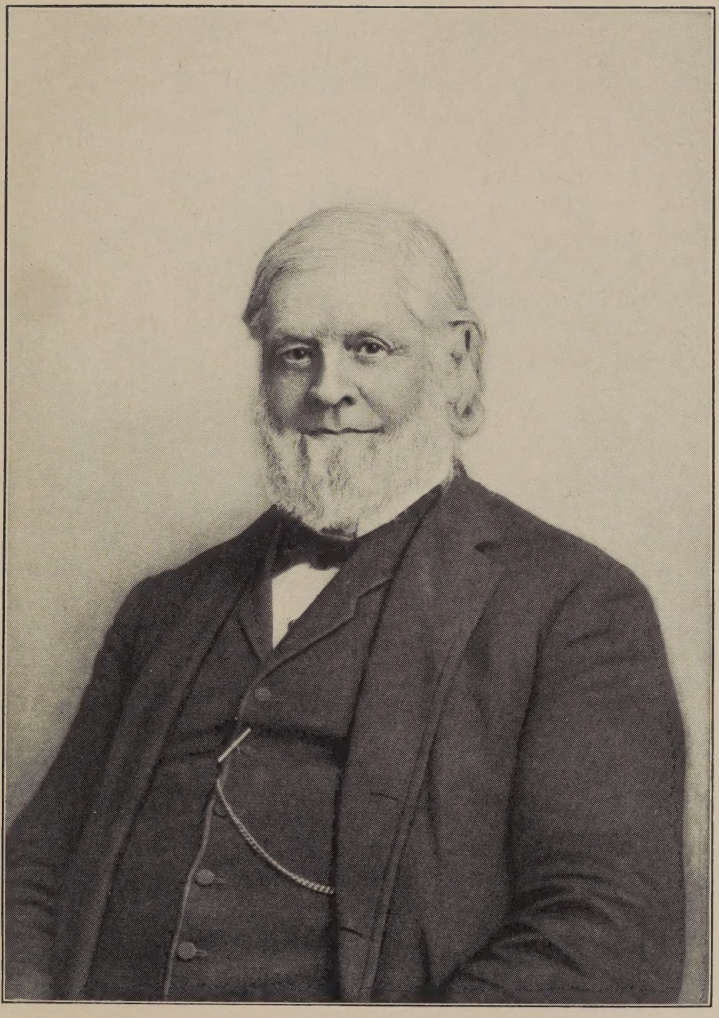
How faithfully he obeyed these instructions, his published re-

* There were at that time about 500 federal prisoners in the various prisons of New York.

ports clearly show. He neglected no opportunity to inform himself of the views of students of penology, living and dead, in all nations, especially of such as had acquired their knowledge of the subject by practical experience in the administration of prisons and of the criminal law. Among his correspondents were Sir Walter Crofton, of Ireland; Sir John Bowring, Messrs. Frederick and Matthew Davenport Hill, and the Misses Florence and Joanna Hill, Florence Nightingale, and Mary Carpenter, of England; Messrs. A. Corne and Bonneville de Marsangy, of France; Baron Franz von Holtzendorff, of Prussia; the Marquis Martino Beltrani Scalia, of Italy; Count Sollohub, of Russia; and many others of equal ability and distinction. Among those from whom he derived valuable counsel and support in his own country may be named some of the leading wardens of prisons, particularly Gaylord B. Hubbell, of Sing Sing, Charles E. Felton, of Buffalo, and Amos Pillsbury, of Albany; Gideon Haynes, of Massachusetts; Z. R. Brockway, of Detroit; and Henry Cordier, first of Wisconsin and later of Pennsylvania. Other collaborators in the same field were Mr. F. B. Sanborn, of Massachusetts; Mr. Richard Vaux, of Philadelphia; the Rev. John L. Milligan, chaplain of the Western Penitentiary of Pennsylvania (his former pupil, whose love for him was like that of a son for a father); the Rev. A. G. Byers, former chaplain of the Ohio State Prison, and afterward secretary of the Ohio State Board of Charities; and many more. The executive committee of the New York Prison Association numbered among its members some of the best and ablest men of the city and state of New York, with the celebrated Dr. Theodore W. Dwight at their head.

The exhaustive study made by Dr. Wines (assisted by certain of the members of the executive committee) of the prisons of New York, convinced the Association that the whole prison system of the state required careful and thorough revision. A committee was therefore appointed* to prepare a plan for its reconstruction. The defects of the existing system were obvious, but the remedy obscure. With a view to profiting by the experience of other states, the executive committee applied to the legislature for a grant of funds to enable it to appoint two commissions, one to visit prisons in this country and the other abroad. Failing to secure an appropriation from the public

* The members of this committee were Theodore W. Dwight, LL.D., Francis Lieber, LL.D., William F. Allen, John T. Hoffman, Rensselaer T. Havens, John H. Griscom, M.D., John Stanton Gould, Thomas W. Clerke, John Ordronaux, M.D., and E. C. Wines. There were subsequently added to it J. W. Edmunds and Warden Hubbell.



Theodore W. Dwight

treasury, resort was had with better success to a private subscription, and Dr. Dwight and Dr. Wines, who were respectively the president and the secretary of the Association, were commissioned to make a tour of the United States and report their observations and conclusions. They visited the states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, West Virginia, Kentucky, Missouri, Michigan, Ohio, Indiana, Illinois and Wisconsin, and even crossed over into Canada. Their report was printed in 1867, at the expense of the state, by order of the legislature.

In this remarkable and epoch-making report they say, among other things worthy of quotation: "Whatever differences of opinion may exist among penologists on other questions embraced in the general science of prison discipline, there is one point on which there may be said to be an almost if not quite perfect unanimity, namely, that the moral cure of criminals, adult as well as juvenile, their restoration to virtue and the 'spirit of a sound mind,' is the best means of attaining the end in view—the repression and extirpation of crime; and hence that reformation is the primary object to be aimed at in the administration of penal justice. We have only, then, to ask ourselves the question, first, how far any given system aims at the reformation of its subjects, and second, with what degree of wisdom and efficiency it pursues that end, to have an infallible gauge wherewith to mark its approach to or recession from the standard of perfection.

"There is not a prison system in the United States which, tried by either of these tests, would not be found wanting. There is not one, we feel convinced, always excepting the department which has the care of juvenile delinquents, which seeks the reformation of its subjects as a primary object; and, even if this were true of any of them, there is not one, with the exception above noted, which pursues the end named, by the agencies most likely to accomplish it. They are all, so far as adult prisoners are concerned, lacking in a supreme devotion to the right aim; all lacking in the breadth and comprehensiveness of their scope; all lacking in the aptitude and efficiency of their instruments; and all lacking in the employment of a wise and effective machinery to keep the whole in healthy and vigorous action."

Space may be allowed for one further extract from their report: "The whole question of prison sentences is in our judgment one which requires careful revision. Not a few of the best minds in Europe and America have, by their investigations and reflections, reached the

conclusion that time sentences are wrong in principle, that they should be abandoned, and that reformation sentences should be substituted in their place. Among the advocates of this view abroad we may mention Mr. Commissioner Matthew Davenport Hill, for nearly thirty years recorder of Birmingham, and one of the ablest criminal judges of Great Britain; and his brother Frederick Hill, for many years inspector of prisons in England and Scotland, and the author of a judicious and valuable treatise under the title of Crime; its Amount, Causes and Remedies. . . . Our own convictions are well and forcibly expressed by the several writers from whom we have taken the foregoing extracts. When a man has been convicted of a crime—burglary, arson, forgery, or any other—we would have the judge address him somewhat after this manner: 'John Doe, . . . until you show, to our satisfaction, that you can be restored to freedom with safety to the community, your imprisonment must continue; and if you never give us such satisfaction, then you can never be discharged; your imprisonment will be for life. . . . We put your fate in your own hands; and it is for you to determine the period, within certain necessary limits, during which the restraint upon your liberty shall continue. You may either prolong it to the close of your life, or restrict it to a duration which you yourself will allow to be but reasonable and just.'"

Dr. Wines held that the three fundamental principles that must underlie and interpenetrate every reformatory system of prison discipline deserve to be called moral axioms, and he stated them as follows:

"1. It must work with nature, rather than against it." This rule is the condemnation of both the so-called Pennsylvania and the so-called Auburn systems: the former ignores man's social nature, and the latter seeks to enforce the impossible rule of absolute silence.

"2. It must gain the will of the convict." This is done by uniting the maximum of kindness with the minimum of severity: large use must be made of the granting and withdrawal of privileges. The promise which appeals most strongly to the mind of the prisoner is that of speedier release, either an absolute discharge by virtue of the commutation act, or a conditional release under the indeterminate sentence.

"3. It must supply a system of reliable tests, to guarantee the genuineness of the reformation claimed for the liberated prisoner." It is precisely at this point that our new American reformatory prisons have failed to accomplish all that was expected from them. This

is an error in administration, which time and experience will no doubt correct.

The most formidable obstacles to the successful application of these principles are found not so much in the character of the subjects of reformatory discipline as in that of the officers by whom it is administered: disbelief in the possibility of reformation, lack of interest in the work, want of adaptation to it, and non-conformity to a sufficiently high standard of moral character and conduct.

Dr. Wines believed in the reformability of criminals, as he believed in the curability of lunatics or the salvability of sinners—with this reservation of course, that neither of the three great hindrances to their restoration (depravity, physical degeneracy and bad environment) is in any given instance insuperable or irremovable. With his whole heart he desired their reformation. But he also believed that the first step to that end must be the reformation of prisons.

The agencies upon which he relied for subduing evil tendencies and dispositions were two, education and labor. Or, if a distinction should be made between the culture of the intellect and of the heart, these agencies are three: religion, education and labor. In other words, since the nature of man is threefold, the treatment to be given to the abnormal or the perverted must be directed at once to soul, mind and body. And, since labor has an educational value, the entire process may be said to be one of education.

As a Christian man and a clergyman, he placed chief stress upon the regenerating influence of religion. He believed in the healing power of the personal touch, and in the need for quickening and quieting the conscience. "As a man thinketh in his heart, so is he."

As a teacher, he set a high value upon the potency of education. "I think," he said, "that a penal establishment—especially in the later stages of imprisonment, which should have less of a punitive and more of a reformatory character impressed upon it—ought to be as it were a great school, in which almost everything should be made subservient to instruction in some form—mental, moral, religious or industrial. Of course I would have school rooms fitted up and classes formed, into which should be gathered such convicts as are in similar stages of advancement. In addition, I would have libraries,* lectures, competitive examinations, and all other needed appliances suited to create and gratify a rational curi-

* It is an interesting historical fact, that the first prison library in the state of New York, if not in the United States, was purchased with a gift of three hundred dollars by William H. Seward, then governor of New York, who was afterward secretary of state under President Lincoln.

osity. In a word, I agree in opinion with Mr. F. B. Sanborn, the late intelligent secretary of the Massachusetts Board of Charities, who, in his evidence before a commission of the Prison Association in 1866, said: 'I doubt if the instruction of prisoners has ever been carried far enough anywhere. Even in Ireland it would be possible to improve it. I would have all convicts taught something, and put in the way of teaching themselves. As a class, they are wretchedly ignorant, and have sinned through some form of ignorance conjoined with vice. To educate them is the plain duty of the state; and, when seriously undertaken, such efforts would show important results. A portion of each day, as well as the evening, should be given to this duty; and those not compelled to labor should be stimulated to some mental occupation, as a defence against bad habits and evil thoughts.' "

One of the arguments against the contract system is that it renders the education of prisoners difficult, if not impossible. In the first place, the contractor buys all the time of the convict; no time is left for school. Moreover, the educational value of most trades pursued in prisons conducted for pecuniary gain, is comparatively slight. They should be chosen with direct reference to their effect upon the mental and moral development of the prisoner and his economic status after his discharge. The contractor, by bidding, selects them with exclusive reference to his own profit. Probably from two-thirds to three-fourths of those convicted of crime have learned no trade, which is one cause of their downfall. If they are not qualified, while in custody and under control, to earn an honest living, the temptations that they were unable previously to meet will return upon them with added power, and the chances of their falling again by the wayside are greatly multiplied.

The entire literature of philanthropy contains perhaps no nobler presentation of the value of manual training in a reformatory institution than the remarkable address on The Influence of Manual Training on Character, delivered in 1888, at the annual session of the National Conference of Charities and Correction in Buffalo, by Dr. Felix Adler, in which he traced the effect of industrial education in strengthening and disciplining the will, in developing the property sense, and establishing a just balance between human faculties. One paragraph of that address is so pertinent to the present discussion, that it may advantageously be cited:

"There are influences in manual training which are favorable to a virtuous disposition. Squareness in things is not without

relation to squareness in action and in thinking. A child that has learned to be exact—that is, truthful—in his work, will be inclined to be scrupulous and truthful in his speech, in his thoughts, and in his acts. The refining and elevating influence of artistic work I have already mentioned. But, along with and over and above all these influences, I need hardly say to you that, in the remarks which I have offered this evening, I have all along taken for granted the continued application of those tried and excellent methods which prevail in our best reformatories I have taken for granted the isolation from society, which shuts out temptation; the routine of the institution, which induces regularity of habit; the strict surveillance of the whole and of every individual, which prevents excesses of the passions, and therefore starves them into disuse. I have taken for granted the cultivation of the emotions, whose importance I am the last to undervalue. I have taken for granted the influence of example, good literature, good music, poetry and religion. All that I have intended to urge this evening is that between good feeling and the realization of good feeling there exists, in persons whose will power is weak, a hiatus; and that manual training is admirably fitted to fill that hiatus."

The moral influence of labor in any institution is *nil*, unless it is productive labor. The workman must make something into which will have entered a portion of his being, and for which he will therefore have a certain affection. There can be nothing more senseless than the "hard" labor to which it was once the fashion to sentence criminals, meaning thereby such ingenious devices for wasting human life and energy as the crank, the treadmill, the shot drill, and (as practised in prisons) the picking of oakum. Their sole purpose was punitive or preventive, or both. Their influence was to deaden and uproot every finer feeling of the soul.

There is a distinction, of which we must not lose sight, between productive labor and profitable labor. The root of all the evils in the New York prison system was the desire to make money out of convicts. Dr. Wines says: "The idea obtained early among our prison officers that the convicts were sent there to be punished, and to that end they must be made to suffer in every form which the law did not expressly forbid, and which a mistaken sense of duty or the distorted ingenuity of cruelty or cowardice could devise. Hence arose the idea, among others of a cognate character, that their labor must be unavailing to them; they must work for nothing, so far as they and their families were concerned. The law nowhere said this.

It was not made any part of the officers' duty, yet they assumed it and acted upon it. After a while it was found that this labor might be made productive of profit. Then the contract system was invented, to the increase of those profits and greatly to the relief of the officers from anxiety and toil. Then the hope was entertained, and its realization aimed at, that the prisons might be made to pay all they cost, and the state be relieved from any expense for the punishment of offenders against the laws; and, finally, that it might be carried so far as actually to be a source of net profit to the state." In the same connection he showed that, after deducting the amounts paid for salaries and wages, the earnings of the three New York state prisons were in a single year $58,740.97 in excess of the cost of their maintenance and all other incidental expenses. He asks: "Cannot the time of the prisoners be put to a better use for the community than in earning the pay of the officers?" The answer to his question depends upon the answer to be given to another: What is the object of a prison? Is it to make money or to make men?

It is not surprising that honest workingmen should have rebelled against the disturbance of the labor market engendered and fostered by competition of this nature. They may possibly be excused for carrying their hostility to profitable prison labor to the point where it assumed the form of a bitter war upon productive prison labor, as well. The contractor had no more consideration for the rights of honest workingmen than he had for the well-being of convicts. Had prison labor never assumed the shape it did, it may be that the outcry against it would not have arisen.

None the less, the opposition to productive labor in prisons is irrational, cruel and wicked. It must be attributed more to pride and avarice than to patriotism or philanthropy. The reasons assigned in support of the contention that an end should be put to the competition of convict labor with "free labor outside" are more specious than convincing. Prisoners cannot be allowed to rot in idleness. Apart from the demoralizing influence of idleness, its tendency is to mental deterioration, insanity and death. No form of labor can be devised, other than trade education, which does not result in competition. Production is the source of national wealth, which benefits all classes of citizens alike. Restrictions upon production are usually contrary to public policy. If prisoners are not permitted to earn their own support, they must be supported from the public treasury, at the cost of the taxpayers; but a large share of the taxes is paid by workingmen. The substitution of trade educa-

tion as a means of occupying the hands and diverting the minds of men in confinement upon a criminal charge merely changes the form of competition; it results in an increase in the number of skilled workingmen, and so affects the rate of wages. Besides, the unconvicted man has a right, and it is his duty, to support himself; how does his change of status relieve him of that duty or deprive him of that right?

The agitation of this question resulted in the introduction, in 1866, of a bill for "an act for the better protection of the mechanics of this state, by regulating the use of convict labor in the several state prisons." It contained a provision forbidding all such labor in any of them as might compete with the labor of mechanics outside. In the year following its defeat, the doctrine was proclaimed that "no trades must be taught to convicts in prison."

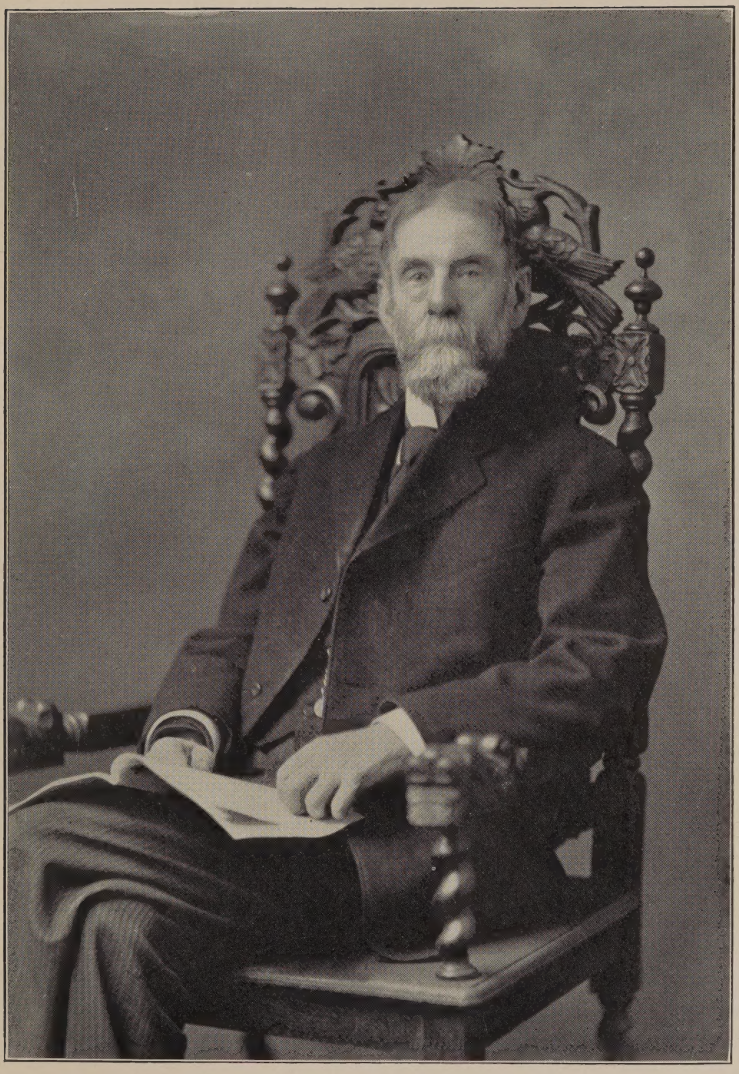
Naturally and logically, Dr. Wines did what lay in his power to stem the tide of opposition which threatened to convert the prisons of New York into costly abodes of helpless, hopeless misery, hotbeds of disease and vice, the disgrace of the century, from which no man could go forth without having been rendered worse instead of better by his enforced sojourn within prison walls. He expressed himself in this regard with vigor, but without loss of temper, though his spirit must have been sorely tried. He said: "The products of labor in prisons, thrown into the general mass of merchandise in the market, interfere with the mechanical and manufacturing interests of free labor about as much as the abstraction of a bucket of water from the Hudson would interfere with the navigation of that river. . . . If it be wise to maintain prisoners in idleness or in unproductive labor, it must be equally wise (and if not, why not?) to maintain certain other classes of people in idleness; those, for instance, who live in a certain street of every town, or whose names begin with a certain letter of the alphabet. . . . The only effect would be to throw upon other persons the labor by which the profit is earned, instead of the labor being performed by the prisoners. . . . If the labor of prisoners in prison is mischievous, their labor out of prison must have been equally so. . . . It would, we think, puzzle any chopper of logic to show how the state is at once benefited by the industry of all her free citizens and injured by that of the small fraction who have been convicted of crime. . . . Even if it were proved that the supplies from prison labor do tend to lower prices, that can hardly be deemed a calamity." He added: "Work—steady, active, honorable work—is the basis of all good, and espe-

cially all reformatory, systems of prison discipline. It not only aids reformation, but is an essential condition of it. . . . Unless a prisoner acquire the knowledge of some handicraft, the taste for work, and the habit of steady industry; in other words, unless he gain the power, as well as the wish, to live honestly, it is all in vain; sooner or later, he will return to criminal courses. . . . We entreat the present legislature to turn a deaf ear to all petitions, come from what quarter they may, which ask for restrictions upon the industries of our prisons."

In 1870, a new bill was proposed, containing four provisions: (1) the abolition of contract labor in all the state penitentiaries, the county penitentiaries, and the reformatories of the state; (2) the prohibition of the manufacture, in any of them, of articles other than such as are exclusively imported from abroad or will least conflict with New York workingmen; (3) forbidding the sale, at prices below their actual market value, of goods manufactured in the prisons of the state; (4) requiring the county penitentiaries to pay their earnings into the state treasury, the legislature to make the appropriations requisite in order to carry on their manufacturing and business operations.

It was apparent that a measure so radical and possibly so far-reaching in its consequences ought not to be enacted without preliminary investigation. The governor was accordingly authorized to appoint a special commission for the performance of this duty. He named Dr. Wines and two other gentlemen, Messrs. Myers and Fencer.

Their conclusions, after visiting all the prisons and taking much sworn testimony (which they submitted with their report), were summed up in ten formal propositions, beginning with a declaration that the contract system should be abolished. Other principles enunciated by them were: that the industries of a prison, as well as its discipline, should ordinarily be managed by its head; that the successful management of these industries requires business experience and tact; that it is unwise to entrust the head of the prison with such management, so long as he is sure to be displaced on every transfer of power from one political party to another; that it would therefore be unwise to change the system of labor without changing the system of government of the prisons; that political control must be eliminated from their organization and administration; that the only way in which that could be accomplished was by means of an amendment to the constitution; that the disturbance of the labor



J. L. Milligan

market resulting from the competition complained of was local rather than general, and it might be obviated to some extent by the multiplication of industries in the prisons; that the opposition of the workingmen was not to productive labor as such, but to the manner of it, in other words, to the contract system; and that the abolition of productive industries in the county penitentiaries and reformatories would involve and necessitate so many and such radical changes, that the question of their relations might wisely be postponed, "to await the result of the movement now in progress to secure the reform of the whole penal system of the state."

The report closed with the recommendation that the amendment to the constitution originally proposed by the Prison Association and incorporated (in a modified form) in the rejected draft of a new constitution proposed by the constitutional convention of 1867, be submitted to the people at the next election, for separate consideration and adoption.

This was the last service offered by Dr. Wines to the cause of prison reform in his adopted state. All his efforts had been crowned with victory, or were in a fair way to it. In the final outcome, he vanquished the prison inspectors, freed the prisons of New York from the strangle-hold of the politicians of both parties, drove out the prison contractors, and prepared the way for the signal reforms that have followed, all or nearly all of which he advocated by his voice and pen, compelling attention to his words by his ability, his character, his singleness of purpose, and his untiring persistency and courage. He had, too, a certain power vaguely described as magnetism, which attracted men to him, even where they were not ready to accept his views, and disarmed opposition. I remember the deep feeling with which Mr. Richard Vaux, the president of the Pennsylvania State Penitentiary, a champion of the strictly cellular system, and a disbeliever in the indeterminate sentence, once said to me, "I would do anything for Dr. Wines."

It remains to relate the story of his connection with the establishment of the Elmira Reformatory.

As far back as 1863, Mr. A. B. Tappan, then a member of the board of state prison inspectors,* and afterward a judge of the supreme court, in a letter to the Prison Association, urged the establishment of a new prison to be called a state penitentiary. The Association approved this suggestion, and memorialized the legislature to carry it into effect, assigning two reasons for its acceptance. The

* Which goes to show that there were good inspectors as well as bad.

first was that it would be of a grade intermediate between the state prisons and the county jails, and thus adapted for the reception of offenders not charged with the major felonies; the second, that it would afford the Empire State an opportunity to erect and organize a prison with all the modern appliances for the health, the discipline, the labor, the instruction, and the reformation of its inmates; "in short, an institution which shall be a model of its kind." In 1868, the Association renewed the effort to secure its creation, giving, as an additional reason why the legislature should grant their request, that it "would afford an opportunity to test, on a small scale and under the most favorable circumstances, what is now generally known as the Irish system of prison discipline." The legislature responded to this appeal by directing the governor to name a commission to select a suitable site and frame a plan for the proposed industrial reformatory.

At what precise date Dr. Wines first had his attention directed to the work of Sir Walter Crofton in Ireland is uncertain. It may have been as early as 1863; it was not later than 1864, for in that year he prepared an article for publication in the *North American Review*, entitled Progress of Prison Reform in England, which was accepted, and was to have appeared in the January number, 1865, but was crowded out by the pressure of other matter. He thereupon withdrew it, in order to include it in the report of the Association for 1864, printed in 1865, where it may be seen. In it he thus refers to the work of Captain Maconochie in Australia: "The discipline originated by this gentleman is known to penologists under the denomination of the 'mark system.' It rests on four chief principles: 1. Instead of a time sentence, it inflicts a labor sentence, thus setting the convicts to win back their freedom by the sweat of their brow. 2. It teaches the prisoners self-denial, by enabling them to purchase a speedier termination to their slavery by the sacrifice of present animal indulgence. 3. It appeals to their social qualities, and makes the prisoners themselves coadjutors in the preservation of discipline, by giving them an interest in each other's good behavior. 4. It prepares them for restoration to society, by gradually relaxing the restraints on their conduct and training their powers of self-governance. To carry out these principles, Captain Maconochie treated the convict as a laborer, with marks for wages, and required him to earn a certain number as the condition of his discharge. These marks had an alternative value; they could either purchase extra food, or the deduction of so many days from the sentence. He fixed on ten

marks as a fair day's wages, the men being paid by piece-work, and not by time, and for every ten marks he saved, the convict shortened his time by a day. At the stores he purchased daily his necessary supplies, paying for them in marks. . . . The marks, too, furnished the means of disciplinary punishment, a proportionate fine being the penalty for every act of misconduct. And while, by this machinery of marks, Captain Maconochie trained his convicts to self-denial and industry, he secured his other objects by different means. He divided the convicts' sentences into three periods," the penal, the social, and the individual, each of which Dr. Wines describes. These were administrative measures; they afford no more than a hint, and hardly that, of the indeterminate sentence as part of a penal code of law.

Between this system and that invented by Sir Walter Crofton there are marked resemblances, although justice to him demands that notice should be taken of his declaration, in a letter written to Dr. Wines in 1867: "There are many mark systems which have no reference to Captain Maconochie's plan. The Irish system is not on his plan, neither is the English. I had not seen his plans until the Irish system had been carried out some time." Of the Irish system Dr. Wines says, in the article cited: "The Irish penal system has a scheme of discipline peculiar to itself, which it owes to the genius of Sir Walter Crofton, a prison disciplinarian of the school of Captain Maconochie," and he intimates his purpose to give an account of it in a later contribution to the *Review*.

Mr. Gaylord B. Hubbell became the warden of Sing Sing prison in the year 1862. He was an enthusiastic admirer of the Irish system, and in 1866 he paid a visit to Ireland for the purpose of seeing it in operation. In his report to the Prison Association he said: "The convict system of Ireland claims to be, and in point of fact is, reformatory in its design and operation. It rests upon two simple principles, but they are broad enough and strong enough to support firmly the entire structure. The first of these is the subjection of the convict to adequate tests prior to his discharge, whereby his reformation can be determined with a reasonable degree of certainty. The second is individualization; that is, such an arrangement of the discipline that each man's case may be separately handled with reference to his antecedents, character, actual state of mind, and the necessities resulting from a combination of all these elements. Of imprisonment proper in the Irish system, there are three distinct stages. The first of these has a strongly punitive character; the second is also in

a high degree penal; while the third, which affords the principal theatre for the operation of those tests of reformation to which reference was just made, loses the penal element almost wholly. There is a fourth stage, which precedes complete liberation from the grasp of the law; namely, release on ticket of leave, a conditional pardon to those who prove themselves worthy of it, in which there is an entire absence of the punitive element. . . . The distinctive feature of the Irish convict system, in the second stage, is the employment of marks to determine the classification. The maximum number of marks attainable by a convict each month is nine, namely, three for discipline, that is, general good conduct; three for school, that is, the attention and desire for improvement shown, and not the absolute proficiency made in the attainment of knowledge; and three for industry, that is, diligence and fidelity in work, and not the mere skill shown therein. . . . Can the Irish system be adopted to advantage in our own country? For my own part I have no hesitation in returning an affirmative answer, with emphasis, to this question. There are, to my apprehension, but two obstacles in the way. These are the vastness of our territory and the inefficiency of our police." Mr. Hubbell proceeds to define in outline a practicable scheme for its introduction into New York. "Let a farm of two or three hundred acres be purchased, situated (say) on the line of the Erie railroad. . . . I would erect a new prison, having three distinct divisions, near to each other, and on the same farm. . . . In the first division, the prisoners, being kept in solitude, would of course take their meals in the cells. In the second division, a comfortable dining hall should be prepared. In the third division, all the arrangements should be such as to give as much freedom as possible to the inmates. . . . Throughout the entire period of imprisonment, all the moral appliances of chaplains, schoolmasters, lecturers, libraries, etc., should be liberally provided and faithfully and zealously used. . . . A careful system of classification of prisoners should be made, based on marks, honestly given according to their character, conduct, industry and obedience. For it must be remembered, and never forgotten, that a classified system of association without impressing on the prisoner's mind the necessity for progressive improvement is of little or no value. . . . All prisoners sent to the proposed establishment should, under proper restrictions, be allowed to work their way out."

These were the views in general entertained by Dr. Wines and by many others in the United States; for instance, by Mr. Sanborn,

who testified before the New York commission appointed to take evidence as to prisons and prison discipline, in 1866: "My knowledge of the Irish system is derived from reading, and not from observation. The principle of the Irish system seems to be to make punishment subordinate to reformation. This principle is carried out by allowing the prisoner to shorten his own sentence, it being supposed that the power of shortening his own sentence is one of the strongest aids to reformation. . . . It can be introduced into any of the states."

The commission appointed by the governor (which numbered among its members Dr. Dwight and Warden Hubbell) reported in 1870 that they had selected a site of two hundred and fifty acres in the city of Elmira, and recommended the erection of buildings to accommodate five hundred prisoners, one in each cell, to be so constructed as to admit of the necessary classification of inmates. Political control was to be obviated—measurably at least—by placing the institution in the hands of a board of managers to be appointed by the governor. The contract system of labor was to be forbidden by law. No prisoners were to be received under the age of sixteen or over that of thirty. The discipline was to consist largely in the bestowal and withdrawal of privileges. But the new and distinguishing feature of the report was its inclusion of the principle of the indeterminate sentence. "We propose to carry out this principle (of rewards) so far, in the felonies for which minor punishments are inflicted, as to make the sentences substantially reformation sentences. It has been a favorite theory of that distinguished criminal judge and philanthropist, Mr. Recorder Hill, of England, that criminals should be sentenced, not for a definite term of years, as at present, but until they are reformed, which may of course be for life. While we do not propose to recommend this rule in full, yet we think that it has much to commend it in principle, and that it may safely be tried in a modified form. A sentence to the reformatory for so short a term as one or two years, with the commutation laws now in force, is not sufficiently long for the efficient action of reformatory agencies. We therefore propose that, when the sentence of a criminal is regularly less than five years, the sentence to the reformatory shall be until reformation, not exceeding five years. . . . This provision is confessedly in the nature of an experiment, and, should it work well, it can easily be extended to other sentences." They were not prepared to recommend conditional liberation, for the reasons stated by Mr. Hubbell, which have been already cited. They remark that "an institution such as we have sketched will meet with no success, unless under the

control of men imbued with reformatory ideas;" but express their confident belief that "the practical working of this scheme will open a new era in prison discipline," and that "its results will lead in time to a reorganization of our state prisons, and will furnish suggestions to other states, whereby the increase of the dangerous classes in society will be checked, and the great problem respecting the disposition of our criminals will be substantially solved." Prophetic words!

Dr. Wines had already printed, in his report for 1866, a translation of the memorable address by Bonneville de Marsangy, delivered in 1846 before the civil tribunal of Rheims, nine years before the initiation of the Crofton experiment, on Preparatory Liberation. M. Charles Lucas, of France, had said that "the end of imprisonment being the reformation of the criminal, it would be desirable to be able to discharge every convict when his moral regeneration is sufficiently guaranteed." Taking this declaration for his text, Marsangy argued that the administration should have "the right, upon the previous judgment of the judicial authority, to admit to provisional liberty, after a sufficient period of expiation, and on certain conditions, the convict who has been completely reformed, reserving the right to return him to prison on the least well-founded complaint." He said that the practice of granting conditional liberation had existed for ten years in France, not merely in the case of young prisoners in Paris, but in the penitentiaries of Lyons, of Rouen, and of Strasburg.*

But conditional liberation is not the indeterminate sentence, any more than the indeterminate sentence is the ticket-of-leave. The two may be conjoined, or either may exist alone.

In a letter to Dr. Wines from Recorder Hill, in 1868, I find the following: "The subject you propose for a paper in your next report —the substitution of reformation sentences for time sentences—is

* This deliverance by M. de Marsangy is generally believed to have been the first public proclamation of the principle of conditional liberation. Singularly enough, an American philanthropist, Dr. Samuel G. Howe, of Boston, in a letter written that self-same year (1846), said: "The doctrine of retributive justice is rapidly passing away, and with it will pass away, I hope, every kind of punishment that has not the reformation of the criminal in view. One of the first effects will be, I am sure, the decrease of the length of sentences, and the adoption of some means by which the duration and severity of imprisonment may in all cases be modified by the conduct and character of the prisoner. What we want is the means for training the prisoner's moral sentiments and his power of self-government by actual exercise. . . . It will be difficult to contrive any system by which any considerable amount of self-government can be left to prisoners, without running the risk of escape. Nevertheless, I do not think that it is impossible to do so; and I believe that there are many who might be so trained as to be left upon their parole during the last periods of their imprisonment with safety and with great advantage to themselves."

one the importance of which cannot be overestimated. . . . It is quite clear that to fix a period for discharge in the sentence is calling on the judge to take upon himself the attributes of a prophet. In short, the reformatory system of treatment by necessary implication calls for the abrogation of time sentences."

Dr. Wines induced Mr. Brockway to furnish a paper for the report submitted to the legislature in January, 1869, in which the able and successful superintendent of the Detroit House of Correction (a municipal prison) discussed the subject of Intermediate or Municipal Prisons. From this paper the following extracts may properly here be quoted: "Legislation is needed to abolish the peremptory character of the sentences imposed upon persons committed to these establishments. The work of reformation is hindered by the sentence to imprisonment for any definite term. . . . Persons whose moral deformity makes them a public offence should be committed to properly organized institutions until they are cured. . . . When a relapse occurs, the patient may be placed under treatment again, as would be the case if he were afflicted with a relapse of contagious disease or mental malady." Among the rewards specified by him as appropriate to a reformatory discipline, he gave the first place to "the hope of release from imprisonment upon the one and only condition of improved character, which condition may be supplied by legislation in connection with the organization."

Mr. Brockway, in his own prison report in 1868, requested his board of managers to procure an act from the legislature of Michigan, "authorizing or directing courts of competent jurisdiction to commit persons from one or all of the classes mentioned," namely, prostitutes, vagrants, confirmed pilferers, etc., "when convicted of misdemeanor, to the house of correction until discharged by the circuit or other judge, on recommendation of the superintendent or inspectors, upon the ground of their improved character." In 1869, the legislature passed the "three years law," on these lines; but it applied solely to prostitutes, and the supreme court held that its provisions were in force only in Wayne county. This was the first indeterminate sentence act in the United States.

In their report for 1869, the directors of the Ohio penitentiary said: "It may seem to be in advance of the present day, but it is, we believe, but anticipating an event not far distant, to suggest that sentences for crime, instead of being for a definite period, especially in case of repeated convictions, will, under proper restrictions, be

made to depend upon the reformation and established good character of the convict."

In 1870, the governor of New York appointed a building commission for the Elmira Reformatory, of which General Amos Pillsbury was chairman. In 1876, the building was ready for occupancy; and on the sixth of May, the board of managers conferred the superintendency of the new institution upon Mr. Brockway, than whom no better choice could have been made. He was fitted for it by experience, by wide acquaintance with the literature of penology, by an open mind and the sort of audacity required for such an experiment, by remarkable ingenuity and fertility in expedients, and above all by hearty sympathy with the avowed purpose of the projected enterprise. In the language of Dr. Dwight, he was "a man imbued with reformatory ideas."

The students and theorists had assiduously and thoroughly prepared the ground. Mr. Brockway, in his first report, laid the corner-stone of the structure thereon to be erected. It was the indeterminate sentence. He prepared the draft of a bill for an act incorporating it into the criminal jurisprudence of the state and of the United States, which his board of managers accepted and recommended to the legislature for adoption. The legislature passed it substantially as drawn, with some unimportant amendments, but with one notable difference. In its original form, it mentioned no maximum term of imprisonment. The second section provided that sentences to Elmira should run "until released therefrom by due process of law." Instead of this, the law, as signed by the governor, reads: "Every sentence to the reformatory of a person hereafter convicted of a felony or other crime shall be a general sentence to imprisonment in the New York State Reformatory at Elmira, and the courts of this state imposing such sentence shall not fix or limit the duration thereof. The term of such imprisonment of any person so convicted and sentenced shall be terminated by the managers of the reformatory, as authorized by this act; but such imprisonment shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted and sentenced." The managers were directed to organize the new prison upon the mark system, and were granted power to release prisoners on parole, without relinquishing custody and control of those so liberated, who could at any time be arrested and re-imprisoned for violation of the law or of the conditions imposed.

This was the culmination of the labors of all who had in any

Sollohub.

measure contributed to the final result, but it was also the dawn of a new era in the history of prisons in this country.*

We must now go back to 1870 and the Cincinnati Congress. Dr. Wines has left the record of the steps that led up to it and its work.† It will add life to this narrative, to give it in his own words, as follows:

"Count Sollohub, the originator, organizer, and successful conductor of a remarkable experiment in prison discipline at Moscow, in replying in 1868 to a request for information on the state of the prison question in Russia, closed a very able report on that subject with the suggestion that an international congress be convoked for a broader study of the question. The thought struck me as both timely and practicable. I was at that time, and had been for a number of years, secretary of the Prison Association of New York, which was then largely national and to a certain extent international, in the sense that it published and circulated information gathered at home and abroad in relation to penitentiary matters, so that its reports‡

* Mr. Brockway, who added extraordinary executive ability to his intellectual courage, candor and originality, demonstrated at Elmira the practicability of administering a prison successfully under the indeterminate sentence, and the value of this adjunct to a truly reformatory discipline. He had had long and varied experience in prison administration, and possessed a peculiar insight into criminal character and conduct. He saw clearly what many were unable to see: the physical basis of thought and of character, and the necessity for reaching the mind through the body; the power of habit, in rendering thought and volition automatic; the psychologic and ethical error of basing reformatory treatment on the retributive principle; the vital connection between crime and economic conditions, so that the economic status of the majority of criminals must be changed, as a condition of their permanent restoration; and the true nature of the entire process of reformation, as one of education, including physical culture, mental development, trade instruction, and moral suggestion. He was a daring experimenter. No popular beliefs, no beliefs which he had himself formerly entertained, could stand before the intensity of his desire to know the truth, or prevent him from speaking the truth, as he saw it. The world has never seen a prison officer like him. A special literature, in many languages, treats of his effort to rebuild the social institution of the prison on a sane, sound and safe basis. His success led to the adoption of his principles and methods, though not without bitter opposition, in most American states, and his influence will outlive him and affect the history of prisons in all lands, for all time to come.

Whether he would have had the opportunity to prove the truth of his theories, but for the preparatory labor, in the state of New York, of Dr. Wines and his colleagues, must forever remain a matter of speculative opinion. They conciliated public opinion in advance, formulated the plans of the Elmira Reformatory, secured its creation, and freed it from political control, leaving to Mr. Brockway a free hand in its subsequent development.

† The State of Prisons and Child-Saving Institutions in the Civilized World. Cambridge, Mass., Wilson, 1880. Pages 45–56.

‡ Baron von Holtzendorff wrote him (in 1868): "The last report of your prison association is excellent work, of uncommon and methodically unprecedented merit. No attempt has hitherto been made to collect within such a report all the materials having reference to the same object in foreign countries. Therefore your idea of printing short reports on foreign prisons, together with those of your New York Association, may lead to a centralization of prison experience."

were sought from all parts of the world by governments as well as by individuals. Accordingly, at the stated meeting of the Association, which constitutes in fact its board of managers, I submitted a proposition that the Association should undertake the convocation and organization of a congress of nations, as suggested by Count Sollohub, for the study and promotion of prison reform.

"This proposition was held under advisement for six months, and finally negatived. But the project had received so much sympathy and encouragement from distinguished friends of the cause on both sides of the Atlantic, that I was unwilling to let it drop without further effort. Consequently, a call was drawn up and issued for the convocation of a national prison reform convention, to meet in October, 1870, at Cincinnati, Ohio, which call was signed by one hundred persons, including a large proportion of the governors of states and the heads of nearly all the principal prisons and reformatories in the country. The result was a congress at the date and place named, composed of some hundreds of members drawn from nearly all the states of the Union.

"The president of the congress was Rutherford B. Hayes, then governor of Ohio, now (1879) President of the United States. And let it be stated here, parenthetically, that Mr. Hayes had determined to attend and take part in the prison congress of Stockholm, which intention was defeated only by his election to the chief magistracy of the nation. This statement will explain the warmth with which he referred to the Stockholm gathering in his first message to the Congress of the United States.

"The sessions of the Congress of Cincinnati continued for six days, with unabated interest from the beginning to the end. It was a hard-working body. Nearly forty papers were read and discussed. Eleven of these were communicated from foreign countries, namely, six from England, two from France, one from Italy, one from Denmark, and one from British East India. The project of organizing a national prison association was considered and adopted, and the preliminary steps to that end taken. A vote was passed to the effect that the time had come when an international congress might be summoned with good hopes of success, and I was honored with an invitation to take charge of the work. Finally, a declaration of principles, thirty-seven in number, was considered, debated, and adopted with, I think, absolute unanimity."

As has been said, Dr. Wines was the author of this Declaration,* which was the mature result of eight years of continuous study of the

* See page 39.

subject. An analytical index to it may be of service as an aid to its comprehension. The numbers in parentheses are the numbers of the articles.

Crime and punishment defined (1).

Responsibility of society for the prevalence of crime (12).

Reformation the supreme end of prison discipline (2, 15).

Classification of prisoners (3, 18) and of prisons (19, 31).

Centralized control (36).

Reformatory agencies: religion (9), education (10), moral training (15), industrial training (16), rewards and privileges (4).

Obstacles to reformation in prisons: degrading punishments (14), short sentences (20).

The indeterminate sentence: inequality of sentences (28), reformation sentences (8), their influence upon the prisoner (5).

Pardons (27).

Probation, the Irish system (18).

Prison officials should be trained for their work (7), must be in sympathy with reformatory aims of the prison (11, 12), must cultivate manhood and self-respect of the prisoner (14).

Politics in prisons (6).

The contract system and its evil effects (17).

Earnings of inmates (32).

Criminal lunacy (25).

Discharged prisoners (22).

Indemnification (24).

Prison statistics (29).

Prison architecture (30).

Prison hygiene (33).

Preventive measures: preventive institutions (21), war on capitalists of crime (23), compulsory education (35).

Responsibility of parents for support of offspring in juvenile reformatories (34).

Women on prison boards (37).

At the congress of London, the American delegates submitted a revised version of these propositions, changing their order, but following closely their substance and expression. As Dr. Wines says, the congress did not adopt them *eo nomine*, but, in an epitome of the sense of the attending delegates, they were reproduced in an altered and abbreviated form. The Americans themselves omitted such as had merely a national interest, like those relating to politics in prisons and the contract system; also some principles not likely to be ac-

ceptable to some from other nations, particularly those about the Irish system and the indeterminate sentence.

At an American conference at Newport, Rhode Island, in 1877, preparatory to the Stockholm congress, they were reaffirmed, with extensive additions.

The relation of Dr. Wines to the international congress apparently warrants carrying this account of his life and labors a little farther. The special subject assigned to the author ends with the Cincinnati congress.

To return to his narrative, Dr. Wines says: "In studying the problem how best to set about the task assigned me,* this thought had great force: If ever true and solid penitentiary reform is had, it must in the end be through the action of governments; therefore it would be desirable to enlist the interest and co-operation of governments in this international study, so that their delegates might keep them *au courant* of both experiment and opinion. This idea was the keynote of my work. My first endeavor was to gain my own government, which was done without difficulty. An act was promptly passed, authorizing the President to appoint a commissioner to the proposed congress, which appointment was placed in my hands, together with a circular letter from the secretary of state addressed to all the diplomatic and consular officers of the government abroad, requesting them to lend their aid in my negotiations with the several governments to which they were accredited, with a view to the organization of the congress. My next step was to call upon the foreign ministers resident in Washington and lay the matter before them, all of whom readily yielded their adhesion, and gave me letters to their respective governments. Thus armed, I visited Europe, and spent the summer and autumn of 1871 in negotiating with the European governments, most of them in person, and the remainder by correspondence through our American ministers. The success of this mission was beyond what could have been anticipated; and when the congress convened in London in the summer of 1872, it was found that all but one of the states of Europe were officially represented in it, the greater part by several delegates. A considerable number of the governments of both North and South America also sent commissioners to take part in the proceedings, as well as many of the individual states of the German Empire and of the American Union. Altogether, the number of official delegates must have reached nearly one hundred.

* The organization of the international congress.

FRONT COVER OF A JAPANESE BOOK ON PRISON REFORM CONTAINING A PORTRAIT OF DR. E. C. WINES AND AN ACCOUNT OF HIS WORK

（明治廿七年四月十六日遞信省認可）

Back Cover of the same Book

"But it seemed equally clear that a congress composed wholly of representatives of governments would have a character too exclusively official, and therefore it was determined to combine a non-official with the official element, so as to give greater freedom and breadth to the discussions.

"The union of these two elements in the same body stamped a character of originality on the congress of London. There had been international congresses of governments and international congresses of private citizens, the one wholly official, the other wholly non-official; but the London congress was unique in that it combined both these elements. It was an illustrious body. Lord Carnarvon was its president. The Prince of Wales honored it with his presence. The British Secretary of State for the Home Department gave official welcome to the foreign delegates in a speech at once cordial and eloquent. . . . The discussions of the congress continued ten days. The questions considered were many and weighty, the discussions able and earnest. . . . Before the congress adjourned without day, it appointed a permanent international penitentiary commission to replace the congress during its recess, to collect and publish international prison statistics, to fix upon the time and place for convoking another congress, and to make all needful preparations for the same."

Of this international commission Dr. Wines was chairman, and he organized the second congress of the series, at Stockholm, of which he was made honorary president. His duties required him to visit Europe on several occasions, when he continued his favorite occupation of visiting and inspecting prisons; probably John Howard himself was never in so many.

His life and work remind one of that saying of Solomon: "Seest thou a man diligent in his business? He shall not stand before mean men, he shall stand before kings." The Emperor of Brazil, when in this country, spent half a day or more in private conversation with him at his own home. Leopold of Belgium talked familiarly with him, seated by his side upon a sofa in the palace at Brussels. Oscar of Sweden toasted him personally at a public banquet. Victor Emmanuel of Italy provided for his entertainment in Rome, as the guest of the government. President Thiers of France called upon him at his hotel in Paris. The French Academy of Moral and Political Sciences invited him to address that body. None of these honors disturbed the sweet simplicity of his soul. He accepted them as tokens of interest in the cause and of admiration for the country

which he represented. He could truly say, with the great apostle, "This one thing I do."

He could not foresee all the logical fruits of his teaching and his example: the blossoming out of the indeterminate sentence, for instance, into the practice of probation, before or after trial, but without imprisonment, of children and adults; and the institution of the juvenile court. His mind did not foreshadow the identification of criminals by the Bertillon system of measurements and by their finger prints, though he approved the plan of criminal registration advocated by Bonneville de Marsangy. Doubtless there are other changes impending, traceable to the same root.

His final gift to the world was his book entitled The State of Prisons and of Child-saving Institutions in the Civilized World, printed by private subscription, which did not appear until after his death, in December, 1879, although he had very nearly completed the task of revising it in the proof-sheets.* It is a treasure-house of information, and its statements are based in large part on written evidence furnished him by the governments with which he had formed relations.

If any apology is needed for the form of this historical sketch of the rise of the new criminology this side of the sea, it is that the great share which one man had in its development and in conciliating public opinion in its favor impart to the story a certain dramatic unity and vital human interest. A full history of the movement would call for the mention of many other names, some of them of still greater distinction; but want of space forbids. Much of that history will be recorded in the various volumes of the present series, to which the reader is referred, with confidence that they will richly repay examination and study.

* Copies of it may possibly still be obtained from the printers, the University Press of Cambridge, Massachusetts.

DECLARATION OF PRINCIPLES PROMULGATED AT CINCINNATI, OHIO, 1870

1. As Adopted by the Congress

I. Crime is an intentional violation of duties imposed by law, which inflicts an injury upon others. Criminals are persons convicted of crime by competent courts. Punishment is suffering inflicted on the criminal for the wrongdoing done by him, with a special view to secure his reformation.

II. The treatment of criminals by society is for the protection of society. But since such treatment is directed to the criminal rather than to the crime, its great object should be his moral regeneration. Hence the supreme aim of prison discipline is the reformation of criminals, not the infliction of vindictive suffering.

III. The progressive classification of prisoners, based on character and worked on some well-adjusted mark system, should be established in all prisons above the common jail.

IV. Since hope is a more potent agent than fear, it should be made an ever-present force in the minds of prisoners, by a well-devised and skilfully applied system of rewards for good conduct, industry and attention to learning. Rewards, more than punishments, are essential to every good prison system.

V. The prisoner's destiny should be placed, measurably, in his own hands; he must be put into circumstances where he will be able, through his own exertions, to continually better his own condition. A regulated self-interest must be brought into play, and made constantly operative.

VI. The two master forces opposed to the reform of the prison systems of our several states are political appointments and a consequent instability of administration. Until both are eliminated, the needed reforms are impossible.

VII. Special training, as well as high qualities of head and heart, is required to make a good prison or reformatory officer. Then only will the administration of public punishment become scientific, uniform and successful, when it is raised to the dignity of a

profession, and men are specially trained for it, as they are for other pursuits.

VIII. Peremptory sentences ought to be replaced by those of indeterminate length. Sentences limited only by satisfactory proof of reformation should be substituted for those measured by mere lapse of time.

IX. Of all reformatory agencies, religion is first in importance, because most potent in its action upon the human heart and life.

X. Education is a vital force in the reformation of fallen men and women. Its tendency is to quicken the intellect, inspire self-respect, excite to higher aims, and afford a healthful substitute for low and vicious amusements. Education is, therefore, a matter of primary importance in prisons, and should be carried to the utmost extent consistent with the other purposes of such institutions.

XI. In order to the reformation of imprisoned criminals, there must be not only a sincere desire and intention to that end, but a serious conviction, in the minds of the prison officers, that they are capable of being reformed, since no man can heartily maintain a discipline at war with his inward beliefs; no man can earnestly strive to accomplish what in his heart he despairs of accomplishing.

XII. A system of prison discipline, to be truly reformatory, must gain the will of the convict. He is to be amended; but how is this possible with his mind in a state of hostility? No system can hope to succeed which does not secure this harmony of wills, so that the prisoner shall choose for himself what his officer chooses for him. But, to this end, the officer must really choose the good of the prisoner, and the prisoner must remain in his choice long enough for virtue to become a habit. This consent of wills is an essential condition of reformation.

XIII. The interest of society and the interest of the convicted criminal are really identical, and they should be made practically so. At present there is a combat between crime and laws. Each sets the other at defiance, and, as a rule, there is little kindly feeling, and few friendly acts, on either side. It would be otherwise if criminals, on conviction, instead of being cast off were rather made the objects of a generous parental care; that is, if they were trained to virtue and not merely sentenced to suffering.

XIV. The prisoner's self-respect should be cultivated to the utmost, and every effort made to give back to him his manhood. There is no greater mistake in the whole compass of penal discipline than its studied imposition of degradation as a part of punishment.

Such imposition destroys every better impulse and aspiration. It crushes the weak, irritates the strong, and indisposes all to submission and reform. It is trampling where we ought to raise, and is therefore as unchristian in principle as it is unwise in policy.

XV. In prison administration, moral forces should be relied upon, with as little admixture of physical force as possible, and organized persuasion be made to take the place of coercive restraint, the object being to make upright and industrious freemen rather than orderly and obedient prisoners; moral training alone will make good citizens. To the latter of these ends, the living soul must be won; to the former, only the inert and obedient body.

XVI. Industrial training should have both a higher development and a greater breadth than has heretofore been, or is now, commonly given to it in our prisons. Work is no less an auxiliary to virtue than it is a means of support. Steady, active, honorable labor is the basis of all reformatory discipline. It not only aids reformation, but is essential to it. It was a maxim with Howard, "make men diligent and they will be honest"—a maxim which this congress regards as eminently sound and practical.

XVII. While industrial labor in prisons is of the highest importance and utility to the convict, and by no means injurious to the laborer outside, we regard the contract system of prison labor, as now commonly practiced in our country, as prejudicial alike to discipline, finance and the reformation of the prisoner, and sometimes injurious to the interest of the free laborer.

XVIII. The most valuable parts of the Irish prison system—the more strictly penal state of separate imprisonment, the reformatory stage of progressive classification, and the probationary stage of natural training—are believed to be as applicable to one country as another—to the United States as to Ireland.

XIX. Prisons, as well as prisoners, should be classified or graded so that there shall be prisons for the untried, for the incorrigible and for other degrees of depraved character, as well as separate establishments for women and for criminals of the younger class.

XX. It is the judgment of the congress, that repeated short sentences for minor criminals are worse than useless; that, in fact, they rather stimulate than repress transgression. Reformation is a work of time; and a benevolent regard to the good of the criminal himself, as well as to the protection of society, requires that his sentence be long enough for reformatory processes to take effect.

XXI. Preventive institutions, such as truant homes, industrial

schools, etc., for the reception and treatment of children not yet criminal, but in danger of becoming so, constitute the true field of promise in which to labor for the repression of crime.

XXII. More systematic and comprehensive methods should be adopted to save discharged prisoners, by providing them with work and encouraging them to redeem their character and regain their lost position in society. The state has not discharged its whole duty to the criminal when it has punished him, nor even when it has reformed him. Having raised him up, it has the further duty to aid in holding him up. And to this end it is desirable that state societies be formed, which shall co-operate with each other in this work.

XXIII. The successful prosecution of crime requires the combined action of capital and labor, just as other crafts do. There are two well defined classes engaged in criminal operations, who may be called the capitalists and the operatives. It is worthy of inquiry, whether a more effective warfare may not be carried on against crime by striking at the capitalists as a class, than at the operatives one by one. Certainly, this double warfare should be vigorously pushed, since from it the best results, as regards repressive justice, may be reasonably hoped for.

XXIV. Since personal liberty is the rightful inheritance of every human being, it is the sentiment of this congress that the state which has deprived an innocent citizen of this right, and subjected him to penal restraint, should, on unquestionable proof of its mistake, make reasonable indemnification for such wrongful imprisonment.

XXV. Criminal lunacy is a question of vital interest to society; and facts show that our laws regarding insanity, in its relation to crime, need revision, in order to bring them to a more complete conformity to the demands of reason, justice and humanity; so that, when insanity is pleaded in bar of conviction, the investigation may be conducted with greater knowledge, dignity and fairness; criminal responsibility be more satisfactorily determined; the punishment of the sane criminal be made more sure, and the restraint of the insane be rendered at once more certain and more humane.

XXVI. While this congress would not shield the convicted criminal from the just responsibility of his misdeeds, it arraigns society itself as in no slight degree accountable for the invasion of its rights and the warfare upon its interests, practiced by the criminal classes. Does society take all the steps which it easily might to

change, or at least to improve, the circumstances in our social state that lead to crime; or, when crime has been committed, to cure the proclivity to it generated by these circumstances? It cannot be pretended. Let society, then, lay the case earnestly to its conscience, and strive to mend in both particulars. Offenses, we are told by a high authority, must come; but a special woe is pronounced against those through whom they come. Let us take heed that that woe fall not upon our head.

XXVII. The exercise of executive clemency in the pardon of criminals is a practical question of grave importance and of great delicacy and difficulty. It is believed that the annual average of executive pardons from the prisons of the whole country reaches ten per cent of their population. The effect of the too free use of the pardoning power is to detract from the *certainty* of punishment for crimes, and to divert the mind of prisoners from the means supplied for their improvement. Pardons should issue for one or more of the following reasons; viz., to release the innocent, to correct mistakes made in imposing the sentence, to relieve such suffering from ill-health as requires release from imprisonment, and to facilitate or reward the real reformation of the prisoner. The exercise of this power should be by the executive, and should be guarded by careful examination as to the character of the prisoner and his conduct in prison. Furthermore, it is the opinion of this congress that governors of states should give to their respective legislatures the reasons, in each case, for their exercise of the pardoning power.

XXVIII. The proper duration of imprisonment for a violation of the laws of society is one of the most perplexing questions in criminal jurisprudence. The present extraordinary inequality of sentences for the same or similar crimes is a source of constant irritation among prisoners, and the discipline of our prisons suffers in consequence. The evil is one for which some remedy should be devised.

XXIX. Prison statistics, gathered from a wide field and skilfully digested, are essential to an exhibition of the true character and working of our prison systems. The collection, collation and reduction to tabulated forms of such statistics can best be effected through a national prison discipline society, with competent working committees in every state, or by the establishment of a national prison bureau, similar to the recently instituted national bureau of education.

XXX. Prison architecture is a matter of grave importance.

Prisons of every class should be substantial structures, affording gratification by their design and material to a pure taste, but not costly or highly ornate. We are of the opinion that those of moderate size are best, as regards both industrial and reformatory ends.

XXXI. The construction, organization and management of all prisons should be by the state, and they should form a graduated series of reformatory establishments, being arranged with a view to the industrial employment, intellectual education and moral training of the inmates.

XXXII. As a general rule, the maintenance of penal institutions, above the county jail, should be from the earnings of their inmates, and without cost to the state; nevertheless, the true standard of merit in their management is the rapidity and thoroughness of reformatory effect accomplished thereby.

XXXIII. A right application of the principles of sanitary science in the construction and arrangements of prisons is a point of vital importance. The apparatus for heating and ventilation should be the best that is known; sunlight, air and water should be afforded according to the abundance with which nature has provided them; the rations and clothing should be plain but wholesome, comfortable, and in sufficient but not extravagant quantity; the bedsteads, bed and bedding, including sheets and pillow cases, not costly but decent, and kept clean, well aired and free from vermin; the hospital accommodations, medical stores and surgical instruments should be all that humanity requires and science can supply; and all needed means for personal cleanliness should be without stint.

XXXIV. The principle of the responsibility of parents for the full or partial support of their criminal children in reformatory institutions has been extensively applied in Europe, and its practical working has been attended with the best results. It is worthy of inquiry whether this principle may not be advantageously introduced into the management of our American reformatory institutions.

XXXV. It is our conviction that one of the most effective agencies in the repression of crime would be the enactment of laws by which the education of all the children of the state should be made obligatory. Better to force education upon the people than to force them into prison to suffer for crimes, of which the neglect of education and consequent ignorance have been the occasion, if not the cause.

XXXVI. As a principle that crowns all, and is essential to all, it is our conviction that no prison system can be perfect, or even

successful to the most desirable degree, without some central authority to sit at the helm, guiding, controlling, unifying and vitalizing the whole. We ardently hope to see all the departments of our preventive, reformatory and penal institutions in each state moulded into one harmonious and effective system; its parts mutually answering to and supporting each other; and the whole animated by the same spirit, aiming at the same objects, and subject to the same control; yet without loss of the advantages of voluntary aid and effort, wherever they are attainable.

XXXVII. This congress is of the opinion that, both in the official administration of such a system and in the voluntary co-operation of citizens therein, the agency of women may be employed with excellent effect.

2. As Originally Submitted by Dr. Wines

[In the published volume of Transactions, Dr. Wines says: "The foregoing Declaration of Principles is, in the main, a condensation of a paper, prepared and printed by the committee of arrangements in advance of the meeting, and distributed for examination to all persons invited to attend the same. The committee of arrangements did not expect that their paper would be adopted by the congress in a form so full as that in which it had originally appeared; and, indeed, they themselves prepared the condensed form for the business committee of the congress. As most of the articles in the original paper contain, severally, not only the statement of a principle, but also a short, incisive, pithy argument in support of it, the publishing committee have deemed it best to give the said paper a place in these transactions, and thus secure for it a more permanent form than it had as published in the 'programme of proceedings.'"]

I. Crime is an intentional violation of duties imposed by law, which inflicts an injury upon others. Criminals are persons convicted of crime by competent courts, and who are committed to custody. Punishment is suffering, moral or physical, inflicted on the criminal, for the wrong done by him, and especially with a view to prevent his relapse by reformation. Crime is thus a sort of moral disease, of which punishment is the remedy. The efficacy of the remedy is a question of social therapeutics, a question of the fitness and measure of the dose.

II. The treatment of criminals by society is for the protection of society. Since, however, punishment is directed, not to the crime

but to the criminal, it is clear that it will not be able to guarantee the public security and re-establish the social harmony disturbed by the infraction, except by re-establishing moral harmony in the soul of the criminal himself, and by effecting, as far as possible, his regeneration—his new birth to respect for the laws. Hence,

III. The supreme aim of prison discipline is the reformation of criminals, not the infliction of vindictive suffering. In the prison laws of many of our states, there is a distinct recognition of this principle; and it is held by the wisest and most enlightened students of penitentiary science. That the majority of imprisoned criminals are susceptible to reformatory influences is the opinion of the most competent prison officers, and is attested by the experience of Mrs. Fry at Newgate, Captain Maconochie at Norfolk Island, Colonel Montesinos at Valencia, Von Obermaier at Munich, Sir Walter Crofton in Ireland, and Count Sollohub at Moscow. But neither in the United States nor in Europe, as a general thing, has the problem of reforming criminals yet been solved. While a few are reformed, the mass still leave the penitentiary as hardened and dangerous as when they entered; in many cases, more so. It is evident, therefore, that our aims and our methods need to be changed, so that practice shall conform to theory, and the process of public punishment be made, in fact as well as pretence, a process of reformation.

IV. The progressive classification of prisoners, based on merit, and not on any mere arbitrary principle, as age, crime, etc., should be established in all prisons above the common jail. Such a system should include at least three stages; viz., 1. A penal stage, with separate imprisonment, longer or shorter according to conduct. 2. A reformatory stage, worked on some mark system, where the prisoners are advanced from class to class, as they earn such promotion gaining, at each successive step, increased comfort and privilege. 3. A probationary stage, into which are admitted only such as are judged to be reformed, and where the object is to test their moral soundness—the reality of their reformation. The prisoner must be tried before he can be trusted. It is the want of a guaranty of his reformation that builds a wall of granite between the discharged convict and honest bread. This trial stage is an essential part of a reformatory prison system, since it furnishes to society the only guaranty it can have for the trustworthiness of the liberated prisoner; and such guaranty is the sole condition on which the various avenues of honest toil will be freely open to his entrance.

V. Since hope is a more potent agent than fear, it should be

made an ever present force in the minds of the prisoners, by a well devised and skilfully applied system of rewards for good conduct, industry, and attention to learning. Such reward should consist of: 1. A diminution of sentence. 2. A participation by prisoners in their earnings. 3. A gradual withdrawal of prison restraints. 4. Constantly increasing privileges, as they shall be earned by good conduct. Rewards, more than punishments, are essential to every good prison system.

VI. The prisoner's destiny, during his incarceration, should be placed measurably in his own hands; he must be put into circumstances where he will be able, through his own exertions, to continually better his condition. A regulated self-interest must be brought into play. In the prison, as in free society, there must be the stimulus of some personal advantage accruing from the prisoner's efforts. Giving prisoners an interest in their industry and good conduct tends to give them beneficial thoughts and habits, and what no severity of punishment or constancy in inflicting it will enforce, a moderate personal interest will readily obtain.

VII. The two master forces opposed to the reform of the prison systems of our several states are political appointments and instability of administration, which stand to each other in the relation of cause and effect. At present, there is scarcely a prison in the country in whose administration politics is not felt as a disturbing—in that of the great majority it enters as the controlling—power. To the needed reform, it is absolutely essential that political control be eliminated from our prison administration, and that greater stability be impressed thereupon. We acknowledge the importance and utility of party politics. In its appropriate sphere, it has a just and noble function. But there are precious interests, in reference to which the only proper rule, as far as politics is concerned, is: "Touch not, handle not." Religion is one of these. Education is another. And, surely, the penal institutions of a state constitute a third, since they combine, in a high degree, the characteristics of both, being at once, when properly conducted, educational and religious. Of all true and permanent reformation (and this is the end of prison discipline), the leading, vitalizing and controlling elements are education and religion—the discipline of the mind and heart. The chief value of any system of prison discipline consists in the intelligence and fidelity with which its administration favors and fosters the implantation and growth of virtuous principles in the prisoners. Prison administrators ought, therefore, first, to be selected with the greatest

care, and then retained during good behavior; which can never be done so long as changes in the official staff are made merely because one political party has gone down and another has gone up in an election.

VIII. The task of changing bad men and women into good ones is not to be confided to the first comers. It is a serious charge, demanding thorough preparation, entire self-devotion, a calm and cautious judgment, great firmness of purpose and steadiness of action, large experience, a true sympathy, and morality above suspicion. Prison officers, therefore, need a special education for their work; special training schools should be instituted for them; and prison administration should be raised to the dignity of a profession. Prison officers should be organized in a gradation of rank and emolument, so that persons entering the prison service in early life, and forming a class or profession by themselves, may be thoroughly trained in all their duties, serving successively as guards, keepers, deputy wardens, wardens of small prisons, and then, according to their ascertained merits, tested chiefly by the small proportion of reconvictions under them, as wardens of larger prisons. Thus alone can the details of prison discipline be gradually perfected and uniformity in its application attained. For only when the administration of public punishment is made a profession will it become scientific, uniform, successful.

IX. Peremptory sentences ought to be replaced by those of indeterminate duration; sentences limited only by satisfactory proof of reformation should be substituted for those measured by mere lapse of time. The abstract justness of this principle is obvious; the difficulty lies in its practical application. But this difficulty will vanish when the administration of our prisons is made permanent and placed in competent hands. With men of ability and experience at the head of our penal establishments, holding their offices during good behavior, we believe that it will be little, if at all, more difficult to judge correctly as to the moral cure of a criminal, than it is of the mental cure of a lunatic.

X. Of all reformatory agencies, religion is first in importance, because most potent in its action upon the human life and heart. We have a profound conviction of the inefficacy of all measures of reformation, except such as are based on religion, pervaded by its spirit, and vivified by its power. In vain are all devices of repression and coercion, if the heart and conscience, which are beyond all power of external restraint, are left untouched. Religion is the

only power that is able to resist the irritation that saps the moral forces of these men of strong impulses, whose neglect of its teachings has been the occasion of their being immured within prison walls.

XI. Education is one of the vital forces in the reformation of fallen men and women, who have generally sinned through some form of ignorance, conjoined with vice. Its tendency is to quicken the intellect, expel old thoughts, give new ideas, supply material for meditation, inspire self-respect, support pride of character, excite to higher aims, open fresh fields of exertion, minister to social and personal improvement, and afford a healthful substitute for low and vicious amusements. Education is, therefore, a matter of primary importance in prisons, and should be carried to the utmost extent, consistent with the other purposes of such institutions. Schools and familiar lectures on common things, with illustrations by maps, globes, drawings, etc., should be instituted; or rather, a prison should be one great school, in which almost everything is made subservient to instruction in some form—moral, intellectual, industrial.

XII. No prison can be made a school of reform until there is, on the part of the officers, a hearty desire and intention to accomplish this object. At present there is no prevalent aim to this effect, and, consequently, no general results in this direction. Such a purpose, commonly entertained by prison officers, would instantly revolutionize prison administration, by changing its whole spirit, and fit reformatory processes will follow this change as naturally as the harvest follows the sowing. It is not so much any specific apparatus that is needed, as it is the introduction of a really benevolent spirit into our prison management. Once let it become the heartfelt *desire* and *intention* of prison officers to reform the criminals under their care, and they will speedily become inventive of the specific methods adapted to their work.

XIII. In order to the reformation of imprisoned criminals, there must be a serious conviction, in the minds of prison officers, that they are capable of being reformed, since no man can heartily maintain a discipline at war with his inward beliefs; no man can earnestly strive to accomplish what, in his heart, he despairs of accomplishing. Doubt is the prelude of failure; confidence a guaranty of success. Nothing so weakens moral forces as unbelief; nothing imparts to them such vigor as faith. "Be it unto thee according to thy faith," is not a mere dictum in theology; it is the statement, as well, of a fundamental principle of success in all human

enterprises, especially when our work lies within the realm of mind and morals.

XIV. A system of prison discipline, to be truly reformatory, must gain the will of the convict. He is to be amended; but how is this possible with his mind in a state of hostility? No system can hope to succeed which does not secure this harmony of wills, so that the prisoner shall choose for himself what his officer chooses for him. But to this end the officer must really choose the good of the prisoner, and the prisoner must remain in his choice long enough for virtue to become a habit. This consent of wills is an essential condition of reformation, for a bad man never can be made good against his will. But such a harmony of wills is, happily, neither an impossibility nor an illusion. In the Irish system it has become a reality as conspicuous as it is pleasing. It was no less so in the prisons of Valencia and Munich, under Montesinos and Obermaier. Count Sollohub has secured it in his house of correction at Moscow. And nowhere can reformation become the rule instead of the exception, where this choice of the same things by prison keepers and prison inmates has not been attained.

XV. The interest of society and the interest of the convicted criminal are really identical, and they should be made practically so. At present there is a combat between crime and law in our whole country. Each sets the other at defiance, and, as a rule, there is little kindly feeling, and few friendly acts, on either side. The criminal seeks to be as evil as he can without incurring punishment, and the law is, for the most part, content with vindicating, or in plainer terms, revenging itself, with indiscriminate severity, on as many as it can detect. It would be otherwise if criminals on conviction, instead of being cast off, were rather made objects of a generous parental care; that is, if they were trained to virtue, and not merely sentenced to suffering. The hearts most proof against the denunciations of vengeance are precisely those most accessible to demonstrations of real interest; and the kindness thus displayed would be "twice blessed"—blessed to those who show and those who receive it. It would be a bond of sympathy and union between them. A happy reconciliation would have taken place between interests now too commonly regarded as antagonistic; and the prison would be made, without in the least impairing its discipline, an effective school of reform; for the conviction would have a solid basis to rest upon, that society is best served by saving, not sacrificing, its criminal members.

XVI. When a man is convicted of a felony or misdemeanor and shut up in prison, he cannot but feel the disgrace of his crime and sentence, and a degree of degradation consequent thereupon. This is a part of his punishment, ordained by heaven itself. Beyond this, no degradation, no disgrace, should be inflicted on the prisoner. His self-respect should be cultivated to the utmost, and every effort made to give back to him his manhood. A degraded dress, stripes, all disciplinary punishments that inflict unnecessary pain or humiliation should be abolished, as of evil influence. Instead the penalty for prison offenses should be the forfeiture of some privilege or of a part of the progress already made towards liberation, with or without a period of strict imprisonment. There is no greater mistake in the whole compass of penal discipline, than its imposition of degradation as a part of punishment. Such imposition destroys every better impulse and aspiration. It crushes the weak, irritates the strong, and indisposes all to submission and reform. It is trampling where we ought to raise, and is therefore as unchristian in principle as it is unwise in policy. On the other hand, no imposition would be so improving, none so favorable to the cultivation of the prisoner's self-respect, self-command, and recovery of manhood, as the making of every deviation from the line of right bear on present privilege or ultimate release. Such punishment would be as the drop of water that wears away the granite rock, and, without needless pain or wanton cruelty, would speedily subdue even the most refractory.

XVII. In prison administration, moral forces should be relied upon with as little admixture of physical force as possible; organized persuasion be made to take the place of coercive restraint; the object being to make upright and industrious *freemen*, rather than orderly and obedient *prisoners*. Brute force may make good prisoners, moral training alone will make good citizens; to the latter of these ends, the living soul must be won; to the former, only the inert and obedient body. Yet unsuitable indulgence is as pernicious as unsuitable severity. A struggle by the convict against opposing forces, whether in the form of inward propensity or outward temptation, is the true idea of prison discipline. A man at the bottom of a well may be lifted up by others, or make his own way to the top against intervening obstacles. The latter method affords the model for a true prison treatment. Mere lapse of time should never give his freedom to an imprisoned criminal; on the contrary he should be required to *earn* it by well directed efforts, resulting in well assured reform. It should be no holiday work for a prisoner to win his dis-

charge. As a rule reformation may be attained only through a stern and severe training. It is in a benevolent adversity, whether in the freedom of ordinary life or the servitude of the prison, that all the manly virtues are born and nurtured. It is easy enough for a bad man to put up with a little more degradation, a little more contumely, a few more harsh restrictions; but to set his shoulder to the wheel, to command his temper, his appetites, his self-indulgent propensities, to struggle steadily out of his position—and all *voluntarily*, all from an *inward* impulse, stimulated by a moral necessity—this is a harder task, a far heavier imposition. And yet it is just this training that a right prison discipline must exact, and exact it until it has wrought its normal result in the reformation of the criminal, as the essential and sole condition of his restoration to freedom.

XVIII. Industrial training should have both a higher development and a greater breadth than has heretofore been, or is now, commonly the case in our prisons. Work is no less an auxiliary to virtue than it is a means of support. Steady, active, honorable labor is the basis of all reformatory discipline. It not only aids reformation, but is essential to it. It was a maxim with Howard, "Make men diligent and they will be honest." Eighty per cent of our imprisoned criminals never learned a trade—a plain indication of the sort of industrial training they need while in prison. In the central prisons of France, sixty-two distinct trades are taught. Montesinos introduced no less than forty-three in his one prison at Valencia, and gave to each convict the liberty of choosing which he would learn. Count Sollohub does the same now in his house of correction at Moscow. To teach a convict a trade is to place him out of the reach of want; it is to make him master of the great art of self-help. And unless he acquire, during his imprisonment, both the knowledge of some handicraft and the habit of work, that is, the power as well as the will to live honestly, he will in nine cases out of ten, sooner or later, give over the struggle, and return to criminal courses.

XIX. The doctrine has been proclaimed that "none of the skilled mechanic arts are to be introduced among convicts;" and a loud clamor has been raised in this and other countries, to which governments have sometimes weakly yielded, against the alleged competition of prison labor with free labor. We denounce the doctrine as inhuman, because it denies a right of humanity, not forfeited or alienated even by crime; and the clamor as baseless and unreasonable on the following grounds: 1. The products of prison

labor, thrown into the general market, are not sufficient to interfere appreciably with those of mechanical and manufacturing labor outside. 2. It is contrary to a sound political economy to suppose that injury to the general interests of society can arise from the circumstance of a number of people being employed in making useful articles for which there is a demand in the community. 3. Whatever might be gained by individuals through a cessation of prison labor, would be lost to society at large in the cost of maintaining the prisoners. 4. Society is benefited by the production of the greatest possible amount of values, so that if prisoners are to cease working, society must be content to be poor by the amount of profit that would accrue from their work. 5. If the labor of men *in* prison is mischievous, their labor *out* of prison must be equally so; whence it follows by parity of reasoning, that society should be benefited by a cessation of labor on the part of people who live in a particular street, or whose names begin with a certain letter of the alphabet; and criminals instead of being reproached for their idleness ought to be applauded as martyrs to the public good, and as necessary though willing sacrifices on the altar of indolence. 6. If our imprisoned criminals had remained honest men the produce of their industry would be in competition with that of the complainants, the same as it is now. Are we, then, to desire the commission of crime, that so much labor may be taken out of the labor market? If the labor of prisoners is injurious to society, an equal amount of free labor must be injurious to the same extent. Surely the same principle applies in both cases. If not, where lies the difference? It would, we think, puzzle any chopper of logic to show that the state is at once *benefited* by the labor of all her free citizens and injured by that of the small fraction who have been convicted of crime. Can anything further be necessary to show the utter absurdity, and, consequently, the absolute futility, of the position taken by the complainants against prison labor? 7. Criminals ought surely to be made to earn their own support while undergoing their sentences, that society may be relieved, to that extent at least, of the burdens imposed upon it by their crimes. 8. Work is the basis of all reformatory prison discipline; so that if the reformation of criminals is important—a point conceded by all—it is no less important that they be trained while in prison to the practice and love of labor.

XX. While industrial labor in prisons, in whatever aspect viewed, is of the highest importance and utility, we regard the contract system of prison labor as prejudicial alike to discipline, finance

and reformation. The directors of the Illinois penitentiary declare that more trouble to the discipline arises from the hundred men let to contractors in that prison, than from the thousand men worked by the state. A feature of prison management of which this can be said with truth—and we do not doubt the truth of the averment—cannot stand the scrutiny now everywhere directed to it. Ultimately, it must fall; and the sooner it falls, the better.

XXI. All the most valuable parts of the Irish or Crofton prison system—the initial punitive stage of separate imprisonment, the reformatory stage of progressive classification, and the probationary stage of moral imprisonment and natural training—are believed to be as applicable to one country as to another. Whether the stage of conditional liberty, or ticket-of-leave, can be introduced into our prison systems, is matter of grave doubt with many—doubt arising from the vast reach of our territory and the multiplication of separate jurisdictions therein. We incline to the belief that Yankee ingenuity is competent to devise some method whereby this principle of the system, as well as the others, may receive practical application among us.

XXII. Prisons as well as prisoners, should be classified or graded, so that there shall be prisons for the untried; prisons for young criminals; prisons for women; prisons for misdemeanants; prisons for male felons; and prisons for the incorrigible. This idea has taken root widely and deeply in the public mind. We may well exchange congratulations on a fact so auspicious; and especially on the fact that acts for the creation of prisons for the younger class of criminals convicted of state prison offenses have been passed in Kentucky, Illinois and New York, into which will be introduced a really reformatory discipline; also, that acts creating separate prisons for women have been adopted by the legislatures of Indiana and Massachusetts. A pressing necessity at the present moment is for district prisons or houses of correction under state management, to which misdemeanants may be sentenced, and where after at the utmost one or two short imprisonments they may be sent for terms sufficiently long for reformatory processes to take effect upon them; or, better still, under sentences running until satisfactory proof of reformation shall have been given.

XXIII. It is believed that repeated short sentences are worse than useless; that, in fact, they rather stimulate than repress transgressions in the case of habitual drunkards, prostitutes, vagrants and petty transgressors of every name. The object here is less to punish

than to save. Hence, the objection to long sentences, drawn from the disproportion between the sentence and the offense, is to no purpose. This is not the question. A lunatic who has committed no offense, but is simply afflicted with a malady that makes him dangerous, is restrained of his liberty until he is cured. Why should not the habitual violator of law, even though each separate offense may be trivial in itself, be treated in the same way? The principle of the treatment is the same in both cases—a benevolent regard to the good of the individual and the protection of society.

XXIV. Greater use should be made of the social principle in prison discipline than is now, or heretofore has been, common in our penitentiary establishments. The highest authorities concur in this judgment. It was a fundamental maxim with Captain Maconochie, who, of all men, went deepest into the philosophy of public punishment, that the criminal must be prepared for society in society. His words are: "Man is a social being; his duties are social; and only in society, as I think, can he be adequately trained for it." Mr. Frederick Hill, a gentleman of large experience as a prison inspector, first in Scotland and afterward in England, says: "When prisoners are brought together, they should really associate as human beings, and not be doomed to eternal dumbness, with their heads and eyes fixed like statues in one direction. All attempts to enforce such a system, and to carry on such a warfare with nature, must be productive of endless deception, and give rise to much irritating punishment." Count Sollohub, of Moscow, an able administrator and profound thinker, holds this language: "The isolation of man, the obligation imposed on him of perpetual silence, belongs to the principles against which the sentiments of the human race revolt. Man has no right to contravene the divine will. It is on this idea that the new Russian penitentiaries have been established. They do not recognize the right to impose perpetual silence; but they seek to prevent conversation becoming hurtful." The social principles of humanity are the great springs of improvement in free society; there is no reason to think that, when duly regulated and fairly applied, they will prove otherwise within the precincts of a prison.

XXV. Preventive institutions, such as public nurseries, truant homes, industrial schools, etc., for the reception and treatment of children not yet criminal, but in danger of becoming so, constitute the true field of promise in which to labor for the repression of crime. Here the brood may be killed in the egg, the stream cut off in the fountain; and whatever the cost of such agencies may be, it will be

far less than the spoliations resulting from neglect and the expenses involved in arrests, trials and imprisonments.

XXVI. More systematic and comprehensive methods should be adopted to save discharged prisoners, by providing them with work, and encouraging them to redeem their character and regain their lost position in society. The state has not discharged its whole duty to the criminal when it has punished him, nor even when it has reformed him. Having raised him up, it has the further duty to aid in holding him up. In vain shall we have given the convict an improved mind and heart, in vain shall we have imparted to him the capacity for industrial labor and the desire to advance himself by worthy means, if, on his discharge, he finds the world in arms against him, with none to trust him, none to meet him kindly, none to give him the opportunity of earning honest bread.

XXVII. The successful prosecution of crime requires the combined action of capital and labor, just as other crafts do. There are two well defined classes engaged in criminal operations—the capitalists who furnish the means and the operatives who work the machinery. There are four classes of criminal capitalists—the owners of houses affording domiciles and places of entertainment to the depredators, the buyers of stolen goods, the pawnbrokers who lend money on such property, and the makers of burglarious and other criminal instruments. The criminal capitalists, being comparatively few, and much more sensitive to the terrors of the law, present the most vital and vulnerable point of the organization. It is worthy of inquiry whether society has not made a mistake in its warfare upon crime. The law now strikes at the many operative plunderers, one by one; would it not be wiser to strike at the few capitalists, as a class? Let it direct its blows against the connection between criminal capital and criminal labor, nor forbear its assaults until it has wholly broken and dissolved that union. We may rest assured that when this baleful organization shall be pierced in a vital part, it will perish; that when the corner stone of the leprous fabric shall be removed, the building will tumble into ruins.

XXVIII. Since personal liberty is a right as respectable as the right of property, it is plainly the duty of society to indemnify the citizen who has been unjustly imprisoned, as it indemnifies the citizen from whom it has taken his field or his house for some public use.

XXIX. Criminal lunacy is a question in which the whole community has a vital interest; and facts show that our laws regarding insanity, in its relation to crime, need revision in order to bring

them to a conformity to the demands of reason, justice and humanity. To this end a commission should be formed of the ablest mental pathologists and criminal jurists, who should be charged with the duty of investigating this whole question, and of suggesting such provisions as would be suitable for enactment into law; so that when insanity is pleaded in bar of conviction, the investigation may be conducted with greater knowledge, dignity and fairness, criminal responsibility be more satisfactorily determined, the punishment of the sane criminal be made more sure, and the restraint of the insane be rendered at once more certain and more humane.

XXX. While this congress would not shield the convicted criminal from the just responsibility of his misdeeds, it arraigns society itself as in no slight degree accountable for the invasion of its rights and the warfare upon its interests, practiced by the criminal classes. In attempting to weigh the ill desert of criminals, it is too common to ignore the degree in which their follies and foibles, leading to crime, are the natural, almost indeed the inevitable result, either of the circumstances in which they were born, or of the indifference, the neglect, even the positive injustice of their more favored brethren; insomuch that what we are compelled by duty to society to punish as criminality, is, in truth, misfortune, not less than fault. Surely, then, the whole guilt, incurred by their offenses, is not theirs; but no inconsiderable part of it rests on the shoulders of society. Does society take all the steps it easily might, to change, or at least to improve, the circumstances in our social state that thus lead to crime? or, when it has been committed, to cure the proclivity to it generated by these circumstances? It cannot be pretended. Let society then lay the case earnestly to its conscience, and strive to mend in both particulars. Offenses must come, but a special woe is denounced against those through whom they come. Let us take heed that that woe fall not upon our head.

XXXI. The exercise of executive clemency, in the pardon of criminals, viewed as a practical question, is one of grave importance, and, at the same time, of great delicacy and difficulty. Of the fifteen thousand criminals confined in the state prisons of the United States, fifteen hundred, that is, ten per cent, not counting those released under commutation laws, were pardoned during the last year; and this proportion was rather below than above that furnished by the statistics of former years. In some states, the average proportion of pardons has reached the extraordinary figure of thirty to forty per cent; and even in Massachusetts, the annual average, during the

entire history of her state prison, has been twenty per cent. The effect of this free use of the pardoning power is, in one word, to demoralize the prison populations of the land. The hopes of all are thus more or less excited; their minds are unsettled; they never become reconciled to their lot; the discipline of the prison is disturbed; the labor of the prisoners has less heart and, of course, less profit in it; and their reformation is impeded, if not defeated, by having their thoughts directed to another and inferior end. The prerogative of pardon is accompanied by a solemn responsibility. The executive head of the state, as a general rule, should not use it, except to prevent the infliction of a wrong on an innocent person. Neither official patronage, nor sympathy, nor generosity, affords a lawful occasion or a valid justification for its use. All exercise of clemency on such grounds must be partial, and therefore unjust; and, under it, what may be a kindness to one will be an injury to others. The logical issue of this reasoning is, that the prerogative of pardon should be exercised on some principle, and agreeably to some fixed rule. This power cannot rightfully be used on the ground that the convict's continuance in prison is a misfortune and a loss to himself and his family; or on the ground that his friends think he was unjustly convicted; or on the ground that his neighbors are anxious for his release, and express that anxiety in long and earnest petitions; or even on the ground that the prosecuting attorney who tried the case and the judge who pronounced the sentence recommend it. In what cases then, and for what reasons, may a pardon be properly granted? We answer: 1. In all cases where it can be made to appear that, since the conviction of the prisoner, such facts have come to light as would, if produced upon his trial and taken in connection with the proof on which he was convicted, have established his innocence. 2. In all cases where it can be made to appear that such newly discovered proof, if given upon the trial, would have so far mitigated the offense charged, as to entitle the criminal to a lighter sentence than the one imposed upon him. In the former of these classes of cases, it would be not only the right but the imperative duty of the executive to grant an instant discharge to the prisoner, not as an act of grace, but as the correction of a grievous wrong; and it would be the duty of society to indemnify the sufferer for the wrong done him. In the latter class, it would be equally the duty of the executive to remit such portion of the sentence as justice might seem to demand. But the new proof had need consist of well-established facts, subject to the same rules of evidence as though offered upon

the trial. Not supposition, or hearsay, or sympathy, or impressions, or surmises, or entreaties, but *facts*, clear and indubitable, can be accepted as the legitimate ground for executive interposition. There may be other isolated and extraordinary cases, in which clemency may be properly extended to imprisoned criminals; but these would have to be decided upon their special claims and merits; and generally, no doubt, there would be some recognized principle that would control the decision.

XXXII. The proper duration of imprisonment for a violation of the laws of society is one of the most perplexing questions in criminal jurisprudence. The law fixes a minimum and maximum for the period of incarceration, leaving a broad interval between the two extremes, so that a wide discretion is left to the courts in determining the length of each individual sentence. We offer a few instances of the manner in which this discretion is used: one man was sentenced to the Maryland penitentiary for ten years for stealing a piece of calico worth only ten dollars; another was sentenced for the same term for perpetrating an atrocious homicide. Two brothers in Maine were convicted of larceny, under circumstances of about equal aggravation. They were both sentenced to the state prison, but by different judges—one for one year, the other for six. Three men in Wisconsin were convicted of forgery. The first forged a check for $3,000—his third offense—and was sentenced to state prison for four years. The second forged a note for $11—his first offense—and was sentenced for four years. The third forged a check for several thousand dollars, and was sentenced for but one year! In Massachusetts one man passed three counterfeit five-dollar bank notes, and was sentenced to state prison for fifteen years; another passed four twenty-dollar notes, and was sentenced for only four years. One man, for having in his possession ten counterfeit bank bills, was sentenced for one year; another who had committed the same offense, for twelve years. Surely such inequalities—and they are occurring every day—are beyond all bounds of reason. They engender great dissatisfaction among prisoners, and the discipline suffers in consequence. No logic can possibly convince a man that it is just that he should suffer the same penalty for stealing a piece of calico that is inflicted on another for a homicide; or that he should have four years' imprisonment for forging a note of hand for eleven dollars, while another gets but one for forging a check for thousands; or that for passing fifteen dollars in bad money he should serve a term of fifteen years in state prison, while his neighbor is let

off with but four years for passing eighty. Obviously, this is an evil to which some remedy ought to be applied. What that remedy shall be—whether judicial discretion shall be confined within narrower limits, whether the single judge who tries shall simply send the convict to prison, leaving the term of imprisonment to be fixed by the full bench, or whether some other measure shall be deemed more fit and effective—we leave to the determination of statesmen, content to have indicated our belief that there is a wrong here that needs to be righted.

XXXIII. The science of statistics, especially as relating to crime and criminal administration, is too little appreciated, and therefore too much neglected, in the United States. The laws of social phenomena can be ascertained only by the accumulation, classification and analysis of facts. Returns of such facts, carefully gathered and skilfully digested, can alone show the true character and working of any system of prison discipline. But the local and the special are here to little purpose; it is the general only, that has value; that is, returns so numerous and drawn from so wide a field as to give real significance to the results. The problem is, how to gather, collate and reduce to tabulated forms, upon some uniform system, the facts which we want. In a country so vast as ours, with distinct penal jurisdiction in every state, and the general government powerless as regards legislation in this department, it is evident that such a result can be effected, if effected at all, only by moral power; and such power, as it seems to us, can be effected in only one or other of two ways, either first, by the institution of a national prison discipline society, with competent working committee in each state; or, secondly, through the establishment, by the general government of a national prison bureau, charged with the duty of devising and promulgating the best forms for prison registers; the best system of recording criminal proceedings; the best modes of tabulating penal statistics; and the best means of securing the preparation of comprehensive, scientific and accurate prison returns. The model for such a bureau we have in the recently instituted national bureau of education. Doubtless it would cost its annual thousands; but indirectly it would save the nation its annual ten thousands. Let it be remembered that crime is the foe against which we war, a mischief great and multiform; and it is to lead the battle and suggest the best methods of assault that this bureau is needed. The conflict must be bold, skilful, sleepless, and with weapons of love rather than vengeance. So assailed, the evil will yield, slowly no doubt, but surely, to the attack.

XXXIV. In previous propositions, we have declared our judgment as to the value of education in prisons and the importance of cultivating the manhood and self-respect of the convict; we now add the declaration of our belief, that both these ends would be materially served by the establishment, under competent editorial guidance, of a weekly newspaper designed for, and adapted to, the wants of imprisoned criminals. Any man, removed for years from active participation in the affairs of life, must have some facility of this sort to enable him to keep pace with passing events. In the nature of things, it must be difficult, if not impossible, for a person, after the seclusion of a long imprisonment, to succeed in the competitions of life; and it seems a duty of society to fortify his purposes and chances of amendment by affording him, during his incarceration, such a knowledge of the world and its doings as may be requisite to success. No better means to this end occurs to us than the general diffusion among prisoners of a newspaper of the character here suggested.

XXXV. Prison architecture is a matter of grave importance. It is impossible, in a brief statement such as is alone suited to the purposes of this paper, to express fully our views on this question. Mere hints, few and brief, are all that can be attempted. Prisons of every class should be substantial structures, affording gratification by their design and material to a pure taste, but not costly or highly ornate. The chief points to be aimed at in prison construction are security, perfect ventilation, an unfailing supply of pure water, the best facilities for industrial labor, convenience of markets, ease of supervision, adaptation to reformatory aims, and a rigid economy. Costly materials and elaborate adornments are not essential to any of these ends, and are subversive of the last. It was a saying of Jeremy Bentham, that "a prison should be so arranged that its chief officer can see all, know all, and care for all." We subscribe to the sentiment. The proper size of prisons is a point of much practical interest. Prisons containing too many inmates interfere with the principle of individualization, that is, with the study of the character of each individual prisoner, and the adaptation of the discipline, as far as practicable, to his personal peculiarities. It is obvious that the application of this principle is possible only in prisons of a moderate size. In our judgment, three hundred inmates are enough to form the population of a single prison; and in no case would we have the number exceed five or six hundred.

XXXVI. The organization and construction of prisons should

be by the state, and they should form a graduated series of reformatory establishments, with facilities for further classifying the inmates of each; they should be constructed with a view to the industrial employment, intellectual education and moral training of the criminals.

XXXVII. As a general rule, the maintenance of all penal institutions, above the county jail, should be from the earnings of their inmates, and without cost to the state. Yet the true standard of merit in their management should be the rapidity and thoroughness of reformatory effect, which is to be sought through the healing and harmonious development of the body, the mind, and the moral nature; and prisoners should be restored to society only at such times and on such conditions as shall give good hope of future rectitude.

XXXVIII. A right application of the principles of sanitary science in the construction and arrangements of prisons is another point of vital importance. The apparatus for heating and ventilating should be the best that is known; sunlight, air and water should be afforded according to the abundance with which nature has provided them; the rations and clothing should be plain, but wholesome, comfortable, and in sufficient but not extravagant quantity; the bedsteads, beds and bedding, including sheets and pillow-cases, not costly but decent, and kept clean, well aired and free from vermin; the hospital accommodations, medical stores and surgical instruments should be all that humanity requires and science can supply; and all needed means for personal cleanliness should be without stint.

XXXIX. The principle of the pecuniary responsibility of parents for the full or partial support of criminal children in reformatory institutions has been extensively applied in Europe, and, wherever tried, has been found to work well in practice. No principle could be more just or reasonable. The expense of such maintenance must fall on somebody; and on whom can it fall more fitly than the child's parent, whose neglect or vices have probably been the occasion of its lapse into crime? Two advantages would be likely to result from the enforcement of this principle: first, it would relieve the public in part, of the burden of supporting its neglected and criminal children; but, second, and chiefly, the fear of compelled contribution for the support of their children in a reform school would be a strong motive with parents, in the absence of higher ones, to a greater care of their education and conduct, that so the burden entailed by their criminal practices might be avoided.

XL. It is our intimate conviction, that one of the most effective

agencies in the repression of crime would be the enactment of laws, by which the education of all the children of the state should be made obligatory. Better to force education upon the people than to force them into prison to expiate crimes, of which the neglect of education and consequent ignorance have been the occasion, if not the cause.

XLI. As a principle that crowns all and is essential to all, it is our conviction that no prison system can be perfect, or successful to the most desirable extent, without some central and supreme authority to sit at the helm, guiding, controlling, unifying, vitalizing the whole. No wiser words were uttered by the committee of 1850 on prison discipline, in the British parliament, than their declaration that "it is desirable that the legislature should intrust increased power to some central authority." Without such an authority, ready at all times for deliberation and action, there can be no consistent and homogeneous system of administration, no well-directed experiments, no careful deductions, no establishment of broad principles of prison discipline, nor any skilfully devised plans for carrying such principles into effect. But under a central board or bureau, improvements of every kind could be readily introduced, and that, too, in the safest manner, by first trying the plan proposed on a small scale and under the best circumstances for insuring trustworthy results, and then, if successful, gradually, under the guidance of experience, extending the sphere of its operations. We ardently hope to see all the departments of our preventive, reformatory and penal institutions in each state moulded into one harmonious and effective system; its parts mutually answering to and supporting each other; and the whole animated by the same spirit, aiming at the same objects, and subject to the same control, yet without the loss of the advantages of voluntary aid and effort, wherever they are attainable.

II

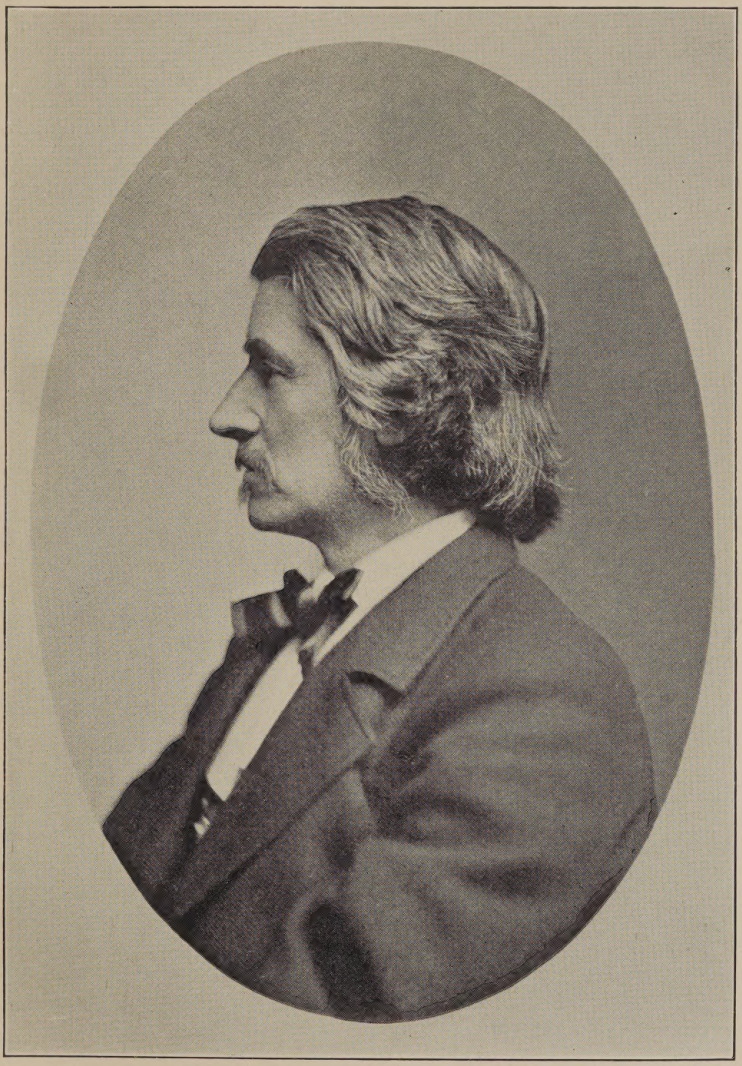
E. C. WINES AND PRISON REFORM

A MEMOIR BY F. B. SANBORN*

THE history of great reforms is the story of many laborers toiling, either in association or widely separated, towards the same chief end. But it is also, in most instances, the personal biography of some one man or woman, to whose devotion and perseverance, for a series of years, the labor of the many was indebted for wise direction, wide advertisement, and practical application at the right place and time. Such a person, in our special task,—the reformation of prison discipline, and the final establishment of prison science,—was the late Dr. Enoch Cobb Wines; and it is a labor of love that one of his early associates now attempts in this essay.

I had never heard of Dr. Wines, except as the author of a few books, when in October, 1863, Governor Andrew of Massachusetts, distinguished as a philanthropist, made me the first secretary of the first Board of State Charities in the United States. Among the many duties of the secretary was the inspection and supervision of some thirty prisons, large and small, in that old Commonwealth, managed, as they were, under an antique and heterogeneous system of laws and customs that had been forming ever since the Pilgrim Fathers landed on Plymouth Rock in 1620. The new secretary of a new board could not for nearly a year devote himself to the examination of this system, so pressing was the need to reorganize establishments for the poor and the insane. But during 1864 I visited all our prisons, and some in other states, and investigated what was then a new system, the Irish convict law and practice. Upon this, and upon the defects of our own prisons, I reported in February, 1865, to the Massachusetts legislature. I also presented the results of the inquiry into European prison systems in the *North American Review* for January, 1866. My report and article fell into the hands of Dr. Wines and Professor Dwight, then investigating the whole prison system of the United

* For years an associate of Dr. Wines in prison reform work.



C. B. Lamborn

States, and I was able officially to promote their inquiry in Massachusetts. A similarity of aims and enthusiasm soon brought us together, the elder and the younger, in prosecuting the task Dr. Wines had undertaken.

We traveled together, visited prisons and addressed audiences in company, and he spent at my house in Concord one or two of those last days of his ever active life which were consecrated to the publication of his last monumental book at Cambridge, where he died, December 10, 1879. He was not quite seventy-four at his death, being born at Hanover, New Jersey, February 17, 1806. His prison work was not taken up till he was past fifty-five, and I joined him in it at three-and-thirty. As Wordsworth sings of an early companion:

> We talked with open heart, and tongue
> Affectionate and true;
> A pair of friends, though I was young,
> And Matthew seventy-two.

I am indebted to Dr. Frederick Howard Wines for recollections of earlier years of his father's life, and an estimate of his admirable qualities, which few are so competent to give. He writes:

"My father possessed one of the rarest types of mind. He seemed not to need the slow process of logical thought in order to arrive at conclusions; nor yet did he reach them by intuition. He rather appeared to grasp them. I often thought his mind resembled a clear pool, into which a truth once cast was instantly enveloped on all sides at once. He felt it, felt the whole of it, and accepted it for what it was. Neither a wit nor a scientist, his mind flowed more freely in the channels of metaphysics and philosophy. Yet he never lost his bearings in a tangle of speculation, and he never cut the thread which binds speculative thought to the real and practical. In his last days he told me, with a face made radiant by inward light, 'I have been greatly blessed; I have never had a religious doubt.' I looked at him with amazement; for the moment my faith was almost shaken in his intellectuality. Most men, as Browning has said, lead 'a life of doubt diversified by faith,' or else 'a life of faith diversified by doubt.' Dr. Wines was an exceptional man in this regard, as in many others.

"The foundation for his work in life was a robust physical constitution, invigorated by his environment and early occupation. His father was a farmer, at first in New Jersey and afterward in Vermont, on the shore of Lake Champlain. We know how simple

and how stern was life on a New England farm one hundred years ago. The first care of a Puritan parent was to instil a firm religious sentiment and strict principles of moral integrity; to teach his children to make Duty their watchword, and to dread the enervating influence of self-indulgence upon character. My father was subjected to no temptation such as overpowers and destroys many another. He passed through the experience called 'conversion'; united with the Church, and doubtless said to himself, 'I have made up my mind to do right.' He never changed it. Like Paul of old, he fought the fight and kept the faith.

"Such a nature could not be held within the narrow confines of a remote country farm. As he approached manhood he determined to go to college. Middlebury was near his home, and he went there. His father, though not a poor man, could not afford to furnish the means required for a liberal education; so the boy earned the money and paid his own way. He prepared himself; and, to show his readiness, I may mention that, finding in his Latin grammar larger and smaller type, he mastered in a single week the paragraphs of chief importance, printed in the larger type. One night in college he worked late over a mathematical problem which he could not then solve. Exhausted, he jumped into bed, and blew out his candle on the small table where he left paper and pencil for the morning. Imagine his surprise then to find the problem solved in his own handwriting! He had done the task in the dark, without any knowledge or remembrance of the fact. Such was the determination with which he attacked any problem before him.

"His original purpose was to prepare for the Christian ministry; whether influenced by the remarkable power and popular esteem of clergymen at that period, I cannot say. Perhaps his mother wished to see him in the pulpit; but my belief is that the impulse came from himself. He had a passion for saving men. Yet he began his career as a schoolmaster, and for some years he conducted a private classical school for boys in Washington on Pennsylvania Avenue, directly opposite the park enclosing the Capitol. There he met, courted and married my mother.

"From Washington he entered the navy, as a teacher of midshipmen, long before the Naval Academy at Annapolis was founded; and he went with his pupils on a voyage to the Mediterranean in the frigate Constellation, now employed as a training-ship. In this relation he served two years and a half, during which he kept a journal, and soon after published two volumes describing his experiences,

which were soon reprinted in London.* His account of the American navy therein was transferred bodily to the early editions of Chambers' Cyclopedia. The difficulties encountered in his work afloat impressed him with the need of a national naval academy, for the establishment of which he was an enthusiastic advocate.

"Later he became proprietor and principal of the Edgehill school for boys at Princeton, a preparatory school for the college. There he interested himself in a state normal school for teachers,—another forward movement in which he took a prominent part. There he wrote two books on popular education, among the first on that topic printed in the United States. He was invited to Philadelphia from Princeton as one of the four original professors selected to open the new city high school, since so eminent, and one of the first of its class organized in this country. He remained in this position until after 1840, and during his residence in Philadelphia wrote often for the *United States Gazette*, a newspaper edited by his friend Joseph R. Chandler,—among other things, some letters from New England, which he soon collected into a small volume containing his early impressions of Boston and Harvard College. A more important work was unique at the time of its publication in 1839,—A Peep at China in Mr. Dunn's Chinese Collection. This was a collection of articles belonging to Nathan Dunn of Philadelphia,—said at the time to be the largest or richest Chinese collection in Western lands; larger than even that at the Hague. The collections then existing at Salem in Massachusetts, and in the rooms of the London East India Company, though rich in East Indian curios, were not equally so in objects illustrative of Chinese life, in which Dr. Wines took a great interest even then. The international and philanthropic bent of his mind is shown in a sentence of his preface to this considerable brochure: 'By some, the following pages may be regarded as an "Apology for the Chinese"; but it is no more an apology than truth and justice demand.'"

It may be remembered that in his last volume, published after his death, Dr. Wines opens with an account of ancient prisons, and gives an early date to the Chinese convict system, then nearly 4000 years old. A curious anecdote, told in this connection, suggests to Dr. Wines that the cellular system originated in China. A king being given over to vice, his premier, Y-in, declared, "No communication

*Their full title was, Two Years and a Half in the Navy; or Journal of a Cruise in the Mediterranean and Levant, on Board of the U. S. Frigate Constellation in the years 1829, 1830, and 1831. Carey and Lea, Chestnut Street, Philadelphia.

must be allowed him with evil companions. I will cause to be built a palace in Tong; there, near the ashes of his royal sire, I will give him instructions, to the end that he may no longer pursue a vicious life."

Accordingly the king lived in his new palace according to the Eastern Penitentiary plan, and at length, says Dr. Wines, "entered into the true path of virtue." This first case of cellular imprisonment, he adds, "is the only case on record in all antiquity of a reformed prisoner." Although in Philadelphia for several years, and no doubt occasionally at the Eastern Penitentiary, Dr. Wines seems to have been more familiar with the Chinese Collection than with the then famous and much disputed prison, which European experts were inspecting and imitating across the Atlantic.

At Princeton, before going to live in Philadelphia, Dr. Wines edited for a time a Monthly Advocate of Education, but it may not have been till 1847 that he publicly advocated a state normal school for New Jersey. In that year, as one of a Convention of the Friends of Education in Burlington County, he reported for a committee an argument for such a school, and a form of petition to the New Jersey legislature requesting its establishment. Letters appended to this report were written to Dr. Wines by Governors Seward of New York and Edward Everett of Massachusetts, Gen. Dix and Bishop Alonzo Potter of New York, Horace Mann, then active with Dr. S. G. Howe in reforming the schools of Boston, and J. R. Chandler of Philadelphia. This list of his correspondents shows how active he was at that date in interesting men of great public influence in the measures he was advocating. He was then (1847) at the head of the Oaklands school at Burlington, New Jersey, of which he took charge in 1844, having left Philadelphia some time before. In 1848–49 the slavery question attracted his attention and claimed his ready pen; for he issued in 1849 a pamphlet of 44 pages, Thoughts on Slavery, with a motto from Paradise Lost, ending

> But man over man
> He made not lord; such title to himself
> Reserving, human left from human free.

It closed with this prophetic declaration:

"The vote by which involuntary servitude has been excluded forever from the Oregon Territory is the pledge of similar triumphs when the same contest shall be renewed on the soil of New Mexico and California. If the friends of human freedom be but true to their

cause and themselves, we shall be spared the humiliation of adding to the crime of national plunder the deeper, darker stain of filling regions now happily exempt from such evils, with the clank, the tears and the blight of slavery. Spirit of Wilberforce, of Clarkson and of Channing, breathe upon our hearts, and arm us for the conflict."*

In this sentiment Dr. Wines was then in accord with the Adamses, Webster, Everett and the Whig party generally, to which he had belonged, although some of them afterward changed their attitude, as Dr. Wines did not. Seldom, however, did he take part in political debates, being more deeply interested in questions of education and religion. A signal instance of the latter was an exposition of his long-considered view of Mosaic legislation, concerning which his son says:

"While in Philadelphia about 1840, he had been asked by a Hebrew Association to give a public address on Moses the Hebrew Lawgiver, which was so well received that in after years he expanded it into a volume, for which he long made elaborate studies. His results were embodied in a series of lectures, which he read at a number of places in New England. In these he took for his main thesis the proposition that the codes of Christendom are founded in principle on the misunderstood and much maligned Mosaic Law. Proceeding from this, he wrote out the first volume of what he hoped might be a work of interest and value, afterwards published at New York by the Putnams, under the title, A Commentary on the Laws

* These were the views of Dr. Wines before the general emancipation, and it may be well to place on record some later views, written in correction of remarks made by his intimate friend, Richard Vaux of Philadelphia, at the Prison Congress of New York, in June, 1876. Dr. Wines added a long note (pp. 456–7) to the address of Mr. Vaux on Prison Discipline, in which he said:

"One word as to race. My friend says, 'The Negro is by *nature* debased and degraded.' I would substitute *slavery* for *nature* in his proposition. His corollary is, 'Apply a different prison discipline to him from what you do to the white man,'—the effect of which would be to widen the chasm between the two races. I say: Diminish the chasm as fast as possible, and in the end close it up by education, religion, and all civilizing, elevating, refining influences; and let all positions, dignities, trusts, responsibilities be open to the Negro as to the white man, whenever he shows himself capable and worthy."

In his own paper, read at the same Congress (p. 408), Dr. Wines said of Moses and his code: "As to slavery, it never had a more hearty hater than Moses; but he did not uproot it by one mighty wrench, for that would have been to do violence to what was then the common sentiment and common practice of the race. But he put in motion a train of influences which were intended to destroy it, and in the end did destroy it among the Jews; and that, not as it has been destroyed among us, but gently, peacefully, without tumult or commotion; above all, without the shedding of fraternal blood."

of the Ancient Hebrews.* This was intended by him to be merely preliminary to a second volume, wherein he designed to reduce the prescriptions and sanctions of the Mosaic Code to the form of a modern law-book; analysing, classifying and restating them in language 'understandable by the people!' With his materials already collected he would have carried out this plan, had he lived longer. When he died, the *Jewish Messenger*, an organ of the Hebrews, observed that, while no man who knew him could doubt that he was a Christian, yet the Jews had never a better friend than they had now lost in Dr. Wines.†

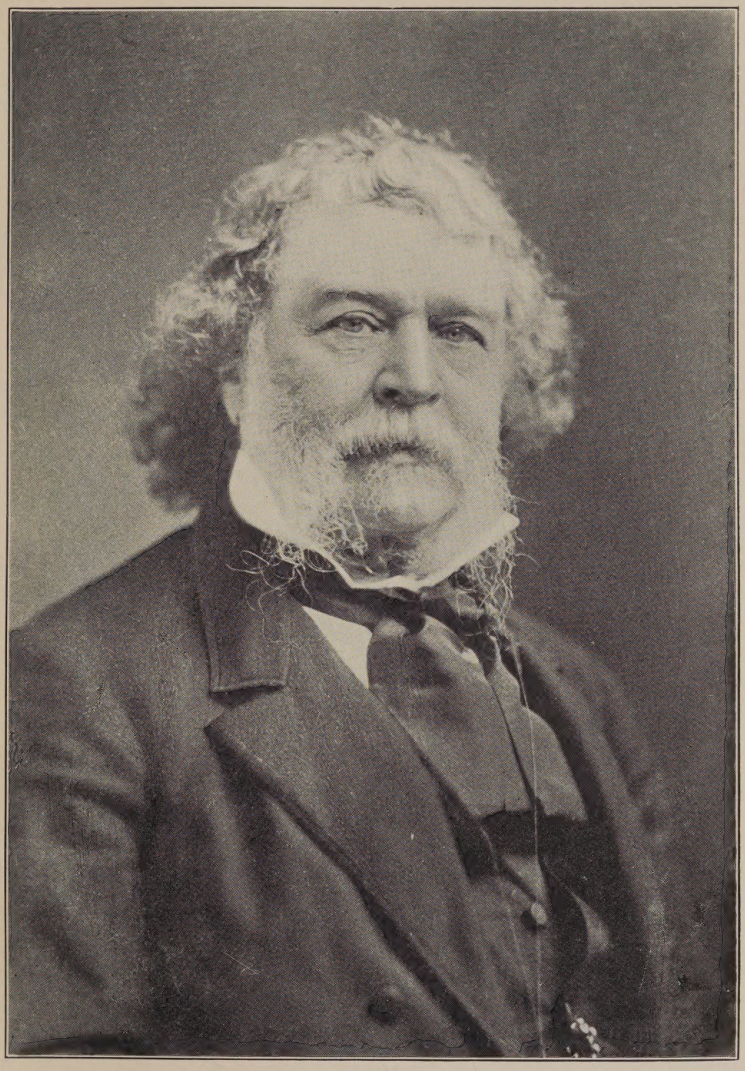
"At long and at last he entered the Christian ministry, a little after 1850; at first to supply a Congregational pulpit in Cornwall, Vermont, and soon after as a Presbyterian pastor in East Hampton on Long Island, where Dr. Lyman Beecher had preceded him, many years before. (It was the parish where, as Mrs. Stowe relates in her father's Life, Dr. Beecher once remarked that the pastor was expected to take part of his pay in whales,—since by an old usage he was entitled to a fair share in any stranded whales within the parish bounds.)

The salary of Dr. Wines was but $600 in money, with the use of a parsonage; and it will illustrate a feature of his character to mention that he at once set aside one-tenth of this small stipend for his benevolences, and lived, with his wife and four children, on $540. From East Hampton he went in the summer of 1853 to be professor of Latin and Greek in Washington College, at Washington in Pennsylvania, at which I graduated in 1857, and where my friend, the late John Milligan, graduated later."

After six years at Washington College, Dr. Wines was invited by friends in St. Louis who wished to found another university there, to be its first president. The occasion of this invitation was the

* A commentary on the Laws of the Ancient Hebrews was published at New York in 1853, more than twenty years after his first two volumes came out in Philadelphia in 1832.

† In this connection I may quote what Dr. F. H. Wines writes:
"It might have been supposed that Mr. Vaux and my father could have little in common. They were of different professions, divergent politics, different shades of religious thought, with widely variant social experiences and circles of acquaintance; and they held divergent theories of prison management. Yet Mr. Vaux said to me, and repeated it warmly, 'There is nothing I would not do for Dr. Wines.' When I remarked that his children sometimes wished he were more a man of the world, Mr. Vaux threw up his hands and exclaimed, 'My God! it would have spoiled him!' I may add that he agreed in my father's lofty estimate of Moses and of Paul, whom Mr. Vaux once characterized as the two greatest men known to serious students of the history of civilization."



Richard Vaux

previous establishment of Washington University at St. Louis, under the administration of its first chancellor, Joseph Gibson Hoyt, my former teacher at Exeter, New Hampshire. He was a graduate of Yale in 1840, and had long been connected with a Congregational church in New Hampshire; but as some of the founders of Dr. Hoyt's university, particularly the Smiths of St. Louis (originally from New Hampshire), were Unitarians, a group of wealthy and prominent Calvinists desired collegiate instruction in their city under influences of which Dr. Wines was a representative. He therefore opened a preparatory school at St. Louis; but the political agitation of 1860, followed by the Civil War, so injured and temporarily destroyed the ancient business of the city, that the proposed university never materialized, and Dr. Wines finally gave up the business of instruction, in which he had been for more than thirty years engaged. Of his character and influence in this part of his life his son says:

"Few men can have ever felt for a father deeper reverence or a warmer affection than I for him. It never occurred to me that it would be possible to disobey him. If he had told me to hold my hand in the fire, I thought I should have no choice but to do it. It never entered my mind that he had been or could be guilty of a wrong act; for he had the courage of a man and the purity of a woman. The influence that he had over me, I noticed that he had over other boys and men. He long had the habit to rise early,—before daylight in winter,—and spend the first morning hour in meditation and the exercises of private devotion. To this practice he doubtless owed much of the power over others which he exerted, and which had this hidden source. In teaching he discarded corporal punishment, as something for which he had no use and felt no need. He could govern a boy without it. His authority inspired affection also."

At this point in his career, and before considering Dr. Wines in his prison work at New York, to which he removed in 1862, and from which center his influence was to radiate in all directions, I will pause awhile to point out what was his preparation for essentially a new task, in which he succeeded beyond all reasonable expectation, far beyond what any other American at that time could have done. Like his friend of later years, Dr. Howe, who had preceded him by thirty years in his practical experience of prison life, and by nearly twenty years in his grasp of the essential principles of prison science, Dr. Wines was (as ancient Lloyd so well describes Sir

Anthony Brown of the Tudor reigns) "the best compound in the world, a learned, an honest and a traveled man; a good nature, a large soul and a settled mind." He was less than five years younger than Howe, and outlived him by less than four years; so that their lives covered much the same period, and almost exactly the same space of time. Their travels began at about the same age (three-and-twenty), and were directed to the same regions in Europe, the countries bordering the Mediterranean. Dr. Howe had more experience with the British navy, Dr. Wines with the American; and both in their narrations described with enthusiasm the same ancient lands, Greece and Italy, with their islands and shores. Both happened to be once in Greece at the same time, near the close of the short administration of Count Capodistrias, first and only president of emancipated Hellas. Capodistrias granted to Howe the thousand or two acres at Hexamilia, near Corinth, where Howe established his unique colony of homeless Greek refugees in 1830, and governed them with the aid of his eccentric friend, the Scotch David Urquhart. Dr. Wines, in his hurried visit to Corinth from Nauplia, rode near this colony, but does not seem to have known of its existence; indeed, it was known to few but its beneficiaries, who welcomed Howe back there in 1844, when he revisited Greece after a long absence. In his second volume of 1832, Dr. Wines thus speaks of Capodistrias, who was assassinated by the sons of old Mavromichali, the ancestor of the late Greek premier:

"May, 1830. Nauplia. The President, the Governor of the city, and most of the officers of the government visited our ship while she lay at Napoli. Capodistrias then gave a splendid entertainment at his palace, at which, however, I had not the honor of being present. When we were again at Napoli in July I called on him, in company with the Captain and the Purser of our frigate. He was a man of the most captivating manners, and of easy conversation. I judged him to be about 65 years of age.*

"He was rather above the ordinary stature, with a high forehead, grey hair, large dark greyish eyes, long features, an intelligent but care-worn expression of countenance, and a form perfectly symmetrical and graceful. His dress was as plain as the simplest re-

* He was in fact but little above fifty; had been brought up at the court of Alexander of Russia, and there acquired the ease of manner noticed by his visitors. He was a patriot and a man of ability, but believed to favor a Russian party in Greece, and had involved himself in one of those feuds for which the Greek revolutionists were notorious, and which cost several of them their lives.

publican could have desired it, and his palace was of plain construction and plainly furnished. It is true that guards were stationed at the entrance,—a regal precaution,—but this was rendered necessary by the character of the people and the state of the country. His conversation, in Italian, was chiefly a detail of political news, in answer to inquiries made by Captain Wadsworth. No allusion was made to the state of Greece, or to his own administration. The country was verging to a revolution. One province was in actual revolt, and some others in not a much better state. The opposition numbered such men as Miaulis, Tombazi, Canaris (naval heroes), Mavrocordato, Conduriotti, General Church, and almost all the officers of the navy. The charges made against Capodistrias were principally these,—subserviency to Russia, abolition of freedom of the press, embezzlement of the public treasures, and the employment of bribes and menaces to corrupt and overawe the legislative and judicial authorities. In confirmation of the last charge, I was assured by an English lawyer resident at Argos that no decision could be obtained, in any court, in favor of a man known to be obnoxious to the President. Whether all these charges were true, I cannot know; but I do know that they were generally believed by the Greek people. It would be unjust to deny that Capodistrias did much to promote civilization; that his efforts were unwearied to facilitate intercourse between different parts of the republic, by the suppression of piracy and robbery; that he gave to education the countenance and support of an enlightened and patriotic statesman; and finally that he introduced something like order and efficiency into public affairs. On the whole, his administration was partly good and partly bad; and had the Greeks been a better people, he would have been a better ruler."

The only hint that this early book gives of an interest by the author in prison affairs was his visit to the State Prison of Greece, then not far from the palace of Capodistrias, which, in turn, was near the church where he was assassinated by the young Mavromichalis, in October, 1831. Dr. Wines says:

"The public penitentiary of Greece is within the fortress of the Palamedi (the citadel of Nauplia). It is an immense building, with walls of prodigious thickness, and from 40 to 60 feet in height. About 40 prisoners were confined within its cells when we were there. A short time previous one poor fellow had attempted to escape by throwing himself from the top of the wall, to which, somehow or

other, he had managed to climb. His body was dreadfully mangled by the fall, and he died in three days."

In his State of Prisons, issued in 1880, after the death of its author, Dr. Wines said of Greece half a century later:

"There are 17 detention prisons, in which, for want of room elsewhere, are also ordinarily confined those sentenced to imprisonment not exceeding a year. There are seven convict prisons. The average number of prisoners is 3600. The annual movement indicates a population of about 8000 during the year."

The enthusiasm of the naval schoolmaster was aroused, as with all travelers in Greece, by the glory of its sunlight and the beauty of its scenery. He said:

"I have beheld with rapture the prospects obtained from the Keep at Carisbrooke Castle, from the Rock of Gibraltar, from the Leaning Tower of Pisa, from the ridge of the crater of Vesuvius, and from the Acropolis at Sardis; but which of them can be compared to that enjoyed on the top of Acro-Corinthos? Here the view is without limits in every direction, and comprehends every description of scenery, from the most desolate sublimity to the softest beauty that adorns the enchanting vales of Greece. Facing the Gulf of Lepanto, the spectator will have before him the plain of Corinth, from four to five miles wide, and from ten to fifteen long; gay with numerous villages and diversified by extensive olive groves, green parterres and golden wheatfields. On his right the gigantic ranges of Cithaeron, Helicon and Parnassus, towering far into the clouds, stretch in apparently interminable outlines to the interior of Northern Greece. Turning his eye to the left, it will rest on the Peloponnesus, exhibiting mountains piled on mountains, with here and there a green valley. Then facing to the east, he will look down on the Saronic Gulf, its bosom gemmed with verdant islets; and far beyond he will discern the promontory of Sunium and the coast of Attica, among whose sacred hills shoots up the still more sacred Acropolis of the city of Minerva. . . . Never shall I forget the wild sublimity of these mountains, or the smiling loveliness of these valleys; never forget the balmy mildness of Grecian evenings, or the celestial purity of the climate. Never shall I forget the clear, deep blue of her waves, or the soft splendors of her moonlight nights; above all, never forget a sunset I once beheld while standing among the ruins of Athens. In the theatre of Herodes Atticus I was between the setting sun and Mount Hymettus, whose western side in its whole extent seemed enveloped in a robe of the softest, most brilliant purple. As the sun

continued to sink, so that his rays ceased successively to strike on different parts of the mountain, the purple tints gradually retreated before a line of sombre hues; and it required little imagination to fancy that I beheld the dark Spirit of Barbarism chasing away the delicate and glorious splendors of Grecian genius."

As I quote, I recognize how faithful is the picture, often seen by me. With descriptions as glowing as this are mingled, in this early book, the soundest observations on men and things, and a perception and record of the graceful or the dismal traits of human nature. The three years therein registered gave him the opportunity for a study of mankind in various countries and under changing conditions; made him familiar with the languages and the manners of the older nations, and trained him in the politeness of the man of the world, whom no situation surprises. His education had given him a written style of learning and good taste; his habits of industry were fixed, and as restful as the leisure of other men; so that thirty years later, at the age of fifty-six, he was well prepared for the new task he then undertook. His son says:

"You are as familiar as I with the main facts of his subsequent career, for which, it soon appeared, his service in the navy, his European tour, and his whole life's discipline had trained him. Though without diplomatic experience, his habit of associating with men of education and influence in this country and abroad, stood him now in good stead. While stationed at the town of Port Mahon, he had become so familiar with Spanish that he said he sometimes dreamed in that tongue; and he had a serviceable knowledge of written French and Italian, without acquiring much readiness in speaking either." These languages were useful in his early prison inquiries, and vitally so when he took up the organization of an international prison congress, following out his rapid success in holding national prison congresses in the United States.

On the 24th of July, 1862, when Dr. Wines took his seat as secretary of the New York Prison Association, that semi-public organization had existed for some sixteen years. He held that place eight years and four months. In 1871, following the Cincinnati Congress, he was made secretary of the National Prison Association there organized; and in the same year was appointed by President Grant a special commissioner of the United States to secure the adhesion of the chief European governments to his project of holding an international congress in London. He succeeded in accomplishing the task assigned, and the first International Prison Congress met at

London in 1872, under the presidency of the Earl of Carnarvon. Thus in the ten years following his first prison appointment in New York, he had triumphantly accomplished what few persons acquainted with the obstacles to be surmounted, and with the indifference of the widely separated and often jealous communities in which he worked during these ten years, would in 1862–65 have looked upon as practicable.

THE NEW YORK PRISON ASSOCIATION

This had been founded by good men of wide experience and extensive theoretical knowledge, but without much power of bringing great results to pass. In its first seventeen years its total income had been less than $41,000, an average yearly revenue of only $2400. Before the new secretary had been a year in office, with the aid of his associates he had secured a yearly appropriation of $5500 from the public authorities of the city and state of New York. When he gave up his office at the close of 1870, the total income of the society had reached $14,000 a year; the aggregate receipts during his term of service being nearly $100,000, or more than twice the amount received during its first seventeen years.

The work carried on in the New York Prison Association, by means of this large increase of its funds, soon extended beyond the limits of that state, and made Dr. Wines known all over the United States. The inquiry into the general prison situation in the United States, in which Theodore W. Dwight was joined with Dr. Wines, was plainly a national work, and was utilized in each of the states where efforts were making to improve the local prisons. It made Mr. Brockway, then managing a prison in Detroit, known to Dr. Wines, and the two men thereafter worked together and accepted me as a volunteer colleague. We found the American Social Science Association, which a few of us had organized at Boston in October, 1865, a very useful auxiliary in bringing together the persons, then not very numerous, who had a serious interest in reforming prisons; and the organization of the Cincinnati Prison Congress in October, 1870, was partly the task of the New York Prison Association and partly of the Social Science Association, which had members in many states. When it came to organizing an international congress, however, the Prison Association hesitated and balked. Dr. Wines gives an account of his successful efforts in his last book.*

* The State of Prisons, p. 46. Quoted by Dr. F. H. Wines in the previous article.

This brief page hints at the result of five years' labor by Dr. Wines and his intimate friends; but what an incessant and widespread labor it was! The reforms urged by me on the Massachusetts legislature in 1865 had been favored and extended by the reports of the New York Prison Association, and especially by Dr. Wines and Professor Dwight, in the report already mentioned. But they had covered a much wider region in their inquiries, and summoned a far greater array of witnesses to the evils that were to be removed, and to the remedies that ought to be applied.

Massachusetts had anticipated New York in laying before the people of America the then recent theories of Captain Maconochie, which, reduced to practice, had demonstrated their soundness under the system of Captain Walter Crofton, and had been introduced with full authority in Ireland in 1854. But New York had anticipated both Massachusetts and Ireland in furnishing a youth of genius, fortified with common sense and business tact, who was building prisons, and showing how they ought to be administered, while Dr. Wines and I were talking about the principles involved. This powerful ally was Z. R. Brockway, originally of Connecticut, but who in his early manhood had migrated to New York. There, under a New Hampshire prison disciplinarian, Amos Pilsbury, he was learning at Albany the lessons upon which he so much improved afterward at Rochester, Detroit and Elmira. We made his personal acquaintance at Detroit in 1866–67, and from that time forward he became a most efficient member of the volunteers of Prison Reform.

But Mr. Brockway, like other prison administrators, was fixed to one spot, and had not the wide range of travel and correspondence that Dr. Wines enjoyed after having first created the occasion for it. The New York secretary traversed the whole North, and opened correspondence with all Europe and some regions of Asia, Africa and South America. By 1869 he was in communication with nearly every person known to be actively interested in prison reformation. Maconochie had died before either Dr. Wines or I took up this question,—October 25, 1860,—but his widow and the widow of Horace Mann (with whom Maconochie had corresponded) furnished us with his inspiring and convincing pamphlets, and with a manuscript which the late Dr. Edward Everett Hale afterwards printed in his short-lived Social Science magazine, *Old and New*. The doctrines of Maconochie were accepted or thought out by others; and it was readily seen that the two old and famous modes of prison management, the Auburn and the Philadelphia systems, were confessedly

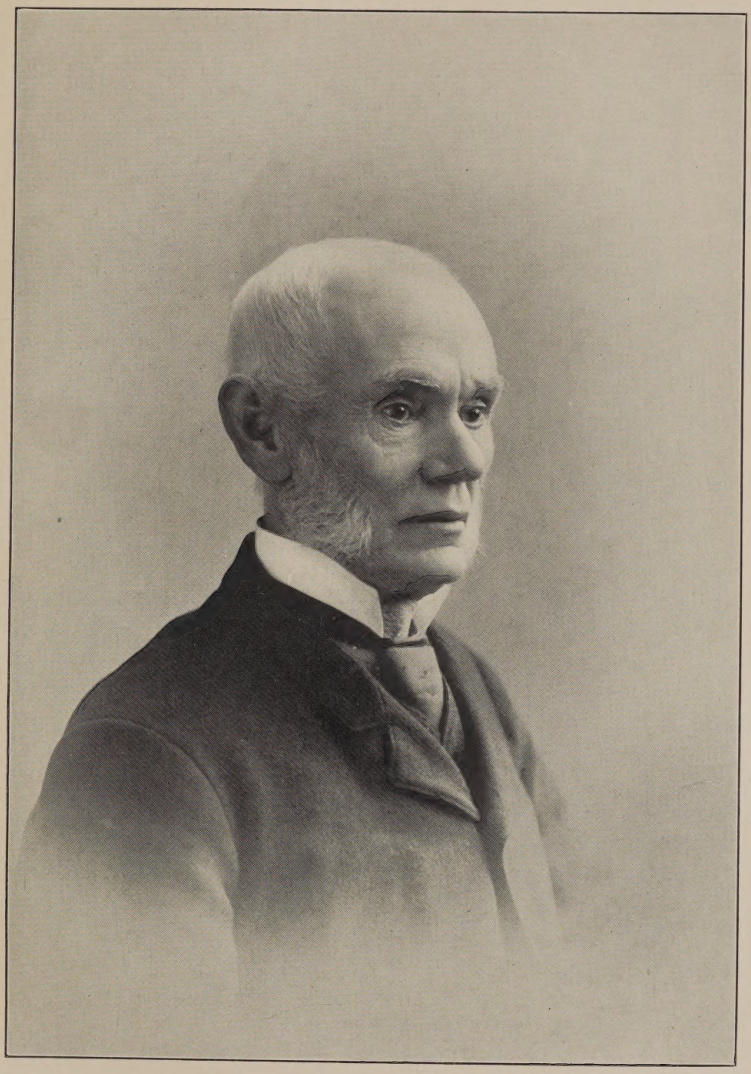
inadequate, often inapplicable, and needed to be combined and supplemented or superseded. This, in his tentative way, Mr. Brockway was doing at Detroit, as it had been done on a larger scale in Ireland by Sir Walter Crofton and his associates. To this fermenting and promising condition of the public mind, Dr. Wines and his New York Prison Association had largely contributed.

THE NATIONAL PRISON ASSOCIATION

But Dr. Wines, like his son since his time, was nothing if not national. To limit himself to a single state, even so important as New York, was out of the question. He therefore early joined the American Social Science Association, and put himself in communication with the British Social Science Association, upon whose model ours was fashioned, but which ours has outlived. Through these organizations, and the slowly increasing state boards, Dr. Wines agitated for an American Prison Congress, and before he left his New York field of action, it had been successfully held at Cincinnati, in the week beginning October 12, 1870. Twenty-five states and the Colombian republic in South America, and Canada in North America, were there represented.

As chairman of the committee of arrangements, of which Dr. Wines had been far the most efficient member, I had the honor of calling the Congress to order; and three of us, Mr. Brockway, Dr. Wines and myself, were the working force on the business committee of the sessions. To us as a sub-committee was referred the draft of a Declaration of Principles, prepared by Dr. Wines; and over this we spent many deliberative hours. As printed in the volume of Transactions, it makes six pages and a half, in thirty-seven separate sections; and, but for the abbreviating powers of his two colleagues, the draft of Dr. Wines would have run to eight or ten pages. His habit of stating all things methodically, whether they were matters generally known and accepted, or were still open to debate, was invaluable; but something must be conceded to the brevity of human life, and the dulness of mankind in general. When we urged this, and shortened the Doctor's periods, his good nature, and his faith in our friendship made him yield; but not without a pang.

I have had occasion to mention the persistence of Dr. Wines in all his good works, and shall need to recur to that trait; it was the perseverance of the saints, and not without some of the *naïveté* of that class. The affection of an author for his own work is one of those natural sentiments, like what the phrenologists used to call in



A. D. Byrd

their sesquipedalian way, "philoprogenitiveness." It was manifested in this case by Dr. Wines in a pleasing manner. As editor of the Cincinnati volume of Transactions, of 650 pages (or, when combined with the report of the New York Prison Association, of nearly 850), he loyally printed there the abridged Declaration, but immediately followed it with his own original draft, prefaced thus:

"The foregoing DECLARATION OF PRINCIPLES is in the main a condensation of a paper prepared and printed by the committee of arrangements, in advance of the meeting, and distributed for examination to all persons invited to attend the same. The committee did not expect that their paper would be adopted by the Congress in a form so full as that in which it had originally appeared; and indeed, they themselves prepared the condensed form for the business committee of the Congress. As most of the articles in the original paper contain, severally, not only the statement of a principle, but also a short, incisive, pithy argument in support of it, the publishing committee have deemed it best to give the said paper a place in these Transactions, and thus secure for it a more permanent form than it had as published in the Programme of Proceedings."

Then follow seventeen solid pages of the draft,—the Declaration having occupied, as has been said, but six and a half. In the Transactions of the International Penitentiary Congress of London, two years later, the same draft reappeared, but now reduced from seventeen pages to eight, and entitled Propositions Submitted to the Congress by the American Delegation. In this abridgment the official Declaration is as much shortened as the original draft, and its thirty-seven sections, as well as the forty-one of the draft, are reduced to but twenty-five.

My own share in the work of the Cincinnati Congress, besides serving on its committees, was chiefly restricted to a brief paper answering the question, How Far is the Irish Prison System Applicable to American Prisons? It followed a longer paper by Sir Walter Crofton on the system as introduced by him in Ireland, and as administered by himself and others for fourteen years in its final form. In this paper he said, "It has been the means of securing the objects contemplated to their fullest extent, and has abundantly refuted the objections made to it."

It is safe to say that every advance in the improvement of prisons and the restoration of culprits to fairly honest lives in American society, since the Cincinnati Prison Congress adjourned, nearly forty years ago, has followed the lines laid down in its Declaration of Principles. Much has been done in this interval, and, alas! much

still remains to do; particularly in the matters of compulsory education, and a uniform system of prisons, duly classified and with the best appliances for labor, school training and self-support. But although he did not live to see all the good results which we see, Dr. Wines knew before his unexpected death, that the good seed he had so diligently sown was bearing abundant fruit. The National Association was organized, and the work of the New York Prison Association went on vigorously; and between these two bodies, the indeterminate sentence, and the Elmira Reformatory Prison were both satisfactorily working before December, 1879. Mr. Brockway took charge of the Elmira experiment in 1876, and it had become an undoubted success long before he resigned its direction in 1900.

THE INTERNATIONAL CONGRESSES

In a certain sense, the Cincinnati Congress was international; for the most eminent European prison reformers and criminal jurists participated in its proceedings by papers and letters; but it led to an actual assemblage of a more international character in 1872, and on several after occasions. From the first, Dr. Wines had aimed at this final result, and he was encouraged to persevere by the words of sympathy that he early received from Europe. His son writes me:

"Dr. Wines entered into active correspondence with prison officials and students of criminology in all the countries of Europe. Among them was Count Sollohub, the head of the prison administration of Russia, who wrote him that the time was ripe for convening an international congress; that, owing to political complications, no European nation could then take the initiative, and America alone could and should do it. He therefore urged my father to attempt this great undertaking. Dr. Wines laid the matter before the directors of the New York Prison Association, who thought it beyond their province, and perhaps beyond the authorization of their state charter, —as it may have been. He therefore decided to act independently; secured supporters and a committee of arrangements, under the signatures of a call for the National Congress at Cincinnati, where the National Prison Association was born. There the first steps were taken toward the organization of an International Prison Congress, which eventuated so happily for us and for the world.

"Before starting for Europe on this errand, under the commission of the United States, he laid out his route in advance, and settled the dates when he would endeavor to be at each point to be visited. This schedule he adhered to, with as much tenacity as cir-

cumstances would allow. For instance, in Berlin, when he called to lay his mission before the great Bismarck, the German Chancellor, word was sent him that he could be received the next day or the day after. 'But tell the Count,' he said, 'that I leave Berlin tonight;' and Bismarck sent for him at once. In Italy, when he arrived, the Court was at the Italian summer capital, during the heat of summer. The king, at the conclusion of the interview granted to my father, said, 'Have you been in Rome?' 'No, your Majesty.' 'Not seen Rome? You must visit there before leaving Italy.' 'I should love to, your Majesty, but I have no time.' The King insisted, and the outcome was that Dr. Wines went to Rome as the guest of the government, accompanied by a gentleman of the Court, who engaged a magnificent suite of apartments for his entertainment, and acted for two days as his personal attendant and guide, showing him as much as he could in that brief time. Two days was all that Dr. Wines would spare for his personal gratification.

"Mr. Peterson of Christiania told me with much glee, in excellent English, spoken with a charming accent, that when he had shown Dr. Wines everything in and about the prison, and they had taken lunch together, he said, 'Now, Dr. Wines, where shall we go this afternoon? Shall we go to such a place, or such a place?' And your father said, 'What is there? Is there a pree-sone there?' And I laughed and said, 'No, there is no pree-sone there; but there is a fine park, and many beautiful ladies, and much to see and enjoy.' And your father said, 'I go nowhere where there is not a pree-sone.' The dear old gentleman added, with great emphasis, 'Mr. Wines, I loaf your fader.' My mother, who was present, and nearly seventy years old, said, 'Mr. Peterson, I hope you love me, too.' He put his hand on his heart and replied, 'Oh yes, Mrs. Wines, I love you, too; but Dr. Wines, he has the first place in my heart.'

"Dr. Wines had the wisdom of the heart; a higher, nobler attribute than mere intellectual acumen. The quality of his emotional nature (although he was neither impulsive nor sentimental) endeared him to those in sympathy with his aims. They felt that he saw 'the light that never was on sea or land.' They took delight in his simplicity, his sincerity, his *naïveté*, his directness, his heartiness and *bonhomie*. He attached them to himself, and could lead them wherever he went.

"As a critic, he had that prime requisite, the capacity to admire. His eye caught first the beauty in individual character and conduct; he was not blind to defect or deformity, but viewed it with the eye

of charity. Yet he was stern and uncompromising in his attitude toward wrong; he loved the sinner, not his sin. His childlike faith in God was accompanied by faith in the essential manhood of every person created in the image of God. The rock on which rested every conviction he entertained regarding the prison question, in gross or in detail, was his unshakable belief in the salvability of man; in the possibilities hidden within the inner consciousness of the worst men; the essential oneness of human nature.

"I once asked him how he dared to set up his belief in the reformability of convicted felons, in opposition to the general opinion of prison keepers (who had better opportunities to study them than he had), that, as a class, they are beyond hope. With indignant earnestness, he exclaimed, 'They have not tried. How does any man know what he can do till he tries?' He had faith in the unseen possibilities, not of convicts only, but of wardens and guards,—and even of prison contractors, for whose inhuman greed and devious political and business methods he felt intense scorn."

In this generous spirit Dr. Wines had devoted himself to the improvement of the prison system of New York, and to the broader inquiries of which I have spoken, and which first attracted my attention and that of our friend Brockway. As the secretary of the newly formed National Prison Association, from 1870 onward, and as commissioner of the United States to visit Europe and arrange for an international congress, his labors were incessant, systematic, and very fruitful. As one of the first corporate members of the National Prison Association, of which Mr. Brockway and myself are almost the only survivors, and as one of its directors in 1876, I joined in a statement from which I may copy here the remarkable facts that we then made public. We said:

"It is known to the public of our own country and of Europe that the Reverend Dr. E. C. Wines has devoted the last fourteen years to the study of the problems of crime, its treatment and its diminution; for eight years as secretary of the Prison Association of New York, and for six years as secretary of the National Prison Association. The success of the last-named association is almost wholly due to his wise, persistent and unselfish efforts, in the face of great discouragements. Since the organization of the prison congress at Cincinnati in 1870, three similar congresses have been held in this country, at Baltimore, St. Louis and New York; and one international congress at London; while the work of preparation for a second international congress, at Stockholm in Sweden, is already well ad-

vanced. These congresses have resulted in the mutual acquaintance, sympathy and support of men engaged in the prison work, who were before almost wholly isolated from each other; have enlarged the views and elevated the aims of prison officials throughout this country, and have attracted very general attention on the part of the public to the importance of the questions involved. They have given an impetus truly wonderful to the movement in behalf of prison reform everywhere; and their published Transactions are a treasury of information for the student, the statesman and the philanthropist, upon all the points of this general subject. The importance and value of these meetings have been recognized by our national and state governments, and by nearly all the governments of Europe, where the movement for prison reform has been put forward by many years.

"These results have involved Dr. Wines in the most arduous labors for their accomplishment. As United States Penitentiary Commissioner, and as our secretary, he has crossed the Atlantic eight times, has negotiated, generally in person, with all the European governments, and repeatedly made long journeys in the United States. He has traveled not less than 60,000 miles, has written 15,000 letters, prepared, edited and published five volumes of Transactions, and has a sixth now (1876) ready for the press. In addition to all this he has been the only financial agent of the National Association for the raising of funds to sustain his work. These collections, made at irregular intervals, amid other duties, have amounted during the past six years to about $20,000, or but $3500 a year for expenses of every description, and he has seldom received the yearly salary of $4000 originally pledged to him as secretary."

Notwithstanding this record of invaluable service, the year 1876 proved to be an unfortunate one for raising money and obtaining Congressional appropriations to carry on the national and international work. The Stockholm Prison Congress was not absolutely settled on for place and date; and a senator from the Pacific coast, who for one reason or another opposed the appropriation, was able to defeat it. Dr. Wines, writing late in July, 1876, said:

"As to the loss of our appropriation at Washington: Senator X. made a speech against it. He reasoned skilfully upon the uncertainty of there being any congress, because there is to be none this year,—the time originally appointed. He painted the United States Commissioner as wandering about Europe in search of a prison congress, and probably being obliged to return without finding it, after

spending thousands of dollars in the search. This was his principal weapon, and there was nobody that knew how to turn it."

The election of General Hayes as president in the winter of 1876–77 placed in authority at Washington a sincere friend of Dr. Wines and of prison reform; and the needful appropriation was made in the first year of his presidency. After retiring to private life in 1881, and when the National Prison Association, which slumbered for a few years in consequence of the death of Dr. Wines, was revived in 1882, General Hayes became its president, and we had the honor and pleasure of meeting with him in that capacity for several years. This association is now active, but its finances are not yet on that secure basis which Dr. Wines suggested in 1876, and which, had he been a younger man, he would doubtless have established, in the manner suggested by him in a letter to Dr. F. H. Wines in the summer of 1876, on the subject of the appeal to the country for funds, of which an extract has here been given. Writing from Irvington, July 23, 1876, he said:

"I have delayed so long to answer your two letters, partly because I do not know what to say, and partly (perhaps chiefly) because, from the depressing influence of the weather and the circumstances, I seem to have lost all elasticity and spring of both mind and body. The proposed scheme can be really carried into effect, if at all, only, in my opinion, by personal effort; and probably the persons cannot be found in the different states who will or can give to it the necessary attention and effort. *My* hands are necessarily tied in an undertaking of this sort; and from your relation to me, you are scarcely more free to take an active part in it than I am. So, upon the whole, I suppose it must be given up.

"Of late I have been thinking of another plan, which, if it can be carried into effect, will be better, because it will give a permanent foundation to the work of the National Prison Association, and enable it to live and move forward in the coming years. It is, through the co-operation of the pastors and other leading citizens, to make a thorough canvass of New York for membership subscriptions of $5, with the distinct understanding that they are to be regarded as annual subscriptions, payable each year in the month of May, till formally withdrawn. This work, by using a carriage for the purpose, I think I might still undertake myself; and it seems to me that 1000 subscriptions of this sort, perhaps more, might readily be secured in the city of New York. With this as a basis, the same work might then be pushed in other large cities, as Boston, Philadelphia, etc. When

the East shall have been pretty well secured for the work in this way, (that is, upon this moderate *individual* scale,) it might then be pushed in the West with better hope of success.

"If we could get throughout the country 4000 annual memberships, it would put the work on a solid and enduring basis; because it would not be difficult to make up with new subscriptions the annual losses occurring by death and withdrawals. Even 2000 such memberships would give the Association a living income.

"I have long been in favor of getting good, earnest working women upon our Board of Directors; *and that must be done.* Women are more sympathetic than men, and they have more leisure for such work. A score or two enlisted in the work of collecting funds would, I believe, accomplish much in this way. These, then, are my present thoughts.

"There is a special objection to undertaking the proposed scheme just now; it is that we are entering upon a presidential election, and the rich men of both parties will be called upon for large subscriptions to carry on the canvass."

This was an excellent plan, but the time was unfavorable. Besides the excitement of the general election, there were individual exigencies in 1876. Mr. Brockway was beginning his great work in Elmira, and had little time or thought for anything else. I was ending a two years' chairmanship of the State Board of Charities, declining a reappointment, in consequence of unsuitable conditions at the Tewksbury State Almshouse; and I was also pledged to promote the infant years of the National Conference of Charities and Correction, which had not become the wide-reaching organization it is now; while the Social Science Association also claimed my attention as secretary. Other friends of Dr. Wines were also occupied with other thoughts, and could only give him their sympathy and occasional aid. Consequently, his plan was never put in force, and his later years were rather hampered by pecuniary cares.

In this particular Dr. Wines had the usual fortune of men of generosity who render public service; but he was exempt from the calumny that is often the lot of such benefactors. He was, of course, subject to the misconstruction and impertinence that is unavoidable in these careers. Dr. Theodore Dwight, already mentioned, who was his companion in a tour of inspection of American prisons, under the authority of the New York Prison Association, and by order of the state of New York, in 1865–66, once mentioned an incident of their visit to a large prison of the middle West. The warden had thought

it might be of advantage to his men, and certainly courteous to his distinguished guests, if he should assemble the whole body of prisoners in the chapel for an hour or two, to hear remarks by the visitors from New York. Dr. Wines was addressing the convicts as his friends, and had their close attention, when the prison contractor entered the room, and rudely interrupted the speaker, saying, "Doctor, are you aware that you are addressing these men *on my time?*" Earlier in his official service, and while Horatio Seymour, who had occasioned some censure by addressing rioters in New York City as "My friends," was governor of New York, Dr. Wines was once visiting Sing Sing prison in company with Governor Seymour. Hearing him address the convicts in his usual manner, as I have heard him in several prisons, the governor remarked with a smile, "Doctor, I believe you and I are the only persons in this state who consider convicts as our friends." It was not literally true, but the number was certainly small. On this point his son says:

"Such faith and such charity,—such a root and such a stem,—could not but culminate in the bright flower of Hope. Dr. Charlton T. Lewis has said that in the management of prisons, and in all our dealings with convicts, we have to choose between fear and hope as motives to action. Fear degrades and hope uplifts. The penal codes of the past were founded on fear; those of the future will be based on hope. The gradual supplanting of fear by hope is a barometric test of the advance of modern civilization. The soul of Dr. Wines was alive with hope; it shone in his countenance, it breathed in every word from his lips or his pen. He inspired hope in all who came under his influence; it radiated from his personality. Men lighted their candles afresh at his flame; their fainting strength renewed as they drank of his spirit.

"But for this serene and rational optimism the examples of other men's labors in the past, and the record of their achievements would not have so appealed to him; men like Montesinos and Obermaier, and Maconochie, like Clement XI and Vilain XIV and Beccaria and John Howard. He gloried in calling attention to them. They were in his thought harbingers of the dawn of a new day. But for this he would not have been so ready to accept the teachings of Whately and Marsangy, of Davenport Hill and Crofton,—pioneers of human thought, messengers proclaiming a new evangel. Nor would he otherwise have manifested such sympathy with our own Brockway, who sought to create a new era of hope for the condemned outcasts of the world, by the introduction of the indeterminate sen-

Ellen C Johnson

tence in the New York Code, and who demonstrated the practicability and the great value of this innovation in criminal law. A genius and a hero, Brockway stands alone among our prison officials, and the memory of what he achieved can never die. Yet, but for my father the Elmira prison would not have been, nor the Sherborn reformatory for women; while the juvenile court, the probation officer and the parole system for first offenders (children or adults) might have been delayed for a generation. Other men *might have* done what he did, but *he* did it; not alone, but with the aid of the few who stood by him while alive, and the many who have followed in his steps since his death. Count di Foresti, an Italian Councillor, has said of him, 'To Dr. Wines, more than to any other individual, is due the great reform which is the glory of the latter half of the nineteenth century.' "

Such is the verdict of filial regard and of disinterested friendship; and if impartial history shall modify it, there will still be enough glory due him in the field where he exhausted his strength without chilling his hope. In spite of discouragements, which by 1876 were the weightier because Dr. Wines had become threescore and ten, and was suffering from a serious lameness, he continued his efforts, and gave his last toil to the compilation of that volume which carries his name down as author of a book that nobody else could have written,—his State of Prisons and of Child-Saving Institutions in the Civilized World. This work, of more than 700 pages, he lived to complete, though not to see it through the press of his friend the Cambridge printer, John Wilson, at whose house he died, in December, 1879. It was a death unexpected, but for which his whole life had been a preparation.

III

THE AMERICAN REFORMATORY PRISON SYSTEM

By Z. R. BROCKWAY

THE American reformatory prison system is based on the principle of protection in place of punishment; on the principle of the indeterminate sentence instead of the usual time sentence; and on the purpose of rehabilitation of offenders rather than their restraint by intimidation. This theory works a change of attitude on the part of the state, a change of the relation of the offenders, and involves a different prison procedure. Together with punishments by imprisonment, every other form of punishment for crimes has, doubtless, to some extent, if vaguely, contained a purpose of protection, yet other aims subversive of protection have unduly influenced criminal legislation and the prison practice: a hateful temper bred of gross superstition attached to the punishments in defense of the gods and to gain their favor; punishment inflicted, assumptively, to equalize the world-balance of diffused morality; to the measuring out of pains in order to meet some notion of impossible justice; punishments to mend the fractured laws and vindicate the state; to intimidate offenders and the tempted and thus deter from crimes; and, by the sufferings of punishments, to induce a salutary reforming penitence. This hateful spirit, under the name retribution, but with somewhat softened severity, characterized the penitentiary system of the last century. But during the latter half of that century better biological and moral conceptions, largely due to the investigations and publications of Charles Darwin, enabled the enactment of more rational criminal laws. The New York law (1877) eliminates the punishment theory, and laws patterned after it, since enacted in other states, also exclude the punitive principle. Thus, in theory and gradually in fact the attitude of the state is becoming changed from its former vengefulness to that of dignified serenity, neither vindictive nor lovelorn, but firmly and nobly corrective.

It is not attempted, now, either accurately to estimate or, in

any direct way, artfully to influence the unrelated inward moral state of the prisoners. It is not denied that idiosyncrasies influence the individual conduct and that these are subject to changes; nor is it doubted that every human impulse and action is, in some way, related to God and the universe of things. But, since the real relation is inscrutable to any but the individual himself within his own variant range of self-consciousness, that relation cannot be deciphered nor properly directed by the legislature, the courts, or by officers of the law. Of course the majority, at any time, may fix the bounds of allowable behavior with due regard to the social welfare, and may erect a standard of social-moral right and wrong; but the morality of motives cannot be so determined. Also this criterion of the social demand may itself be reversed or modified by change of time and place and immediate condition; and the very terms Good and Evil are always of capricious significance. "Evils as they are termed are goods to the unjust, and only evils to the just, and goods are truly good to the good but evil to the evil." The effect of conduct does not reliably reveal the real moral motive, for well-intentioned conduct may prove injurious and evil intentions may lead to benefits. Recently one of my former prisoners died after his twenty years of good service and behavior on the editorial staff of a leading metropolitan newspaper. When, as a prisoner, he was compelled to change his daily conduct he at once seized upon the educational advantages at hand to prepare for a notable criminal career. He never suffered any conscious revolution of motive, but gradually and imperceptibly his inward intention, rated evil, faded out. Then, like an aeronaut in an unballasted balloon, he floated unconsciously into the higher social and so higher moral altitude.

None can gainsay Plato's definition that, "he is good whose soul is good. . . . The virtuous principle is intellectual, not emotional or voluntary. . . . It is knowledge that determines the will." If to this we add Aristotle's criterion of virtue, that, "virtue is a habit accompanied with deliberate preference in the relative mean defined by reason as a prudent man defines," we may accept Lord Bacon's declaration that, "there is no man doeth wrong for the wrong's sake but to purchase for himself a pleasure or profit." In the depths of human action thus fathomed there seems to disappear any trace of intrinsic unrelated morality of conduct.

It is, therefore, a principle of the newer penology that the state shall not judge the heart's intentions, and shall not designedly trespass upon the mystical field of the soul's moral relations; but,

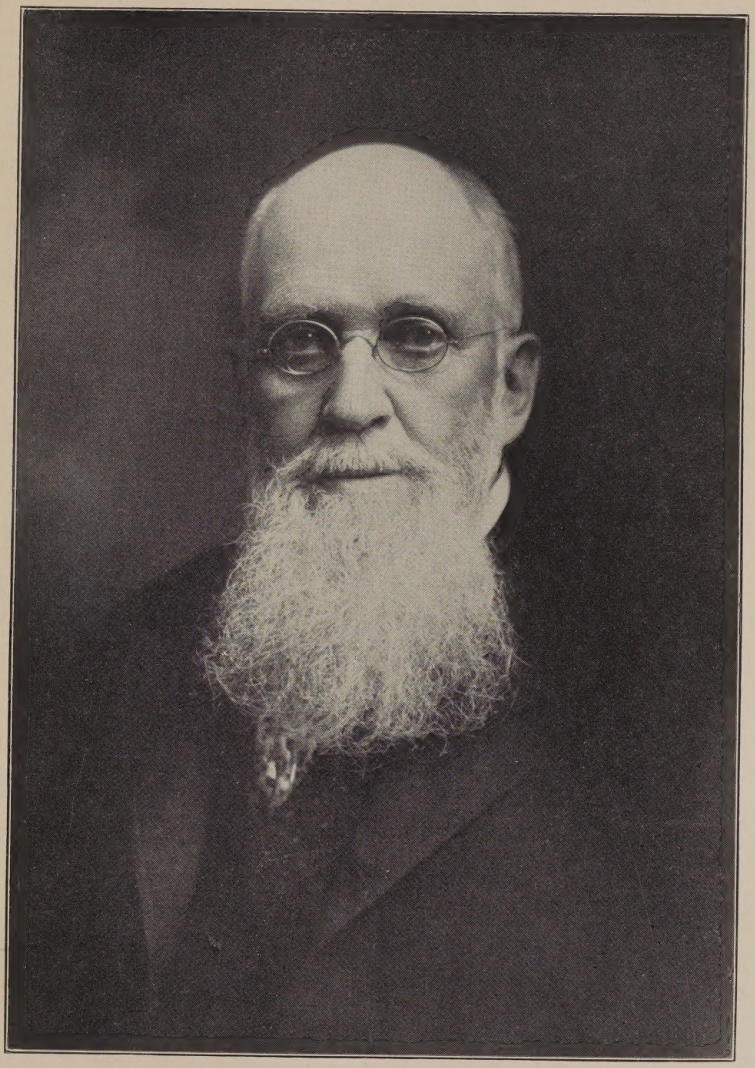
instead, shall remain devoted to the rational regulation of the prisoner's conduct with sole regard to the public security.

Having thus relinquished pursuit of mystic morality because it is deemed impossible correctly to estimate intrinsic moral quality, the pursuit of administrative justice is for a similar reason also withdrawn. Justice Fry, who firmly held to the doctrine of just punishment for crimes, admitted that the doctrine takes root "in the endeavor to find a fitness of pain to sin which the world does not satisfactorily supply," and, in his dilemma, advocated that always the greatest conceivable injury of the various crimes should govern the amount of penalty. He would strike offenders hard enough to compensate the greatest possible evil, and so fully recompense the lesser wrong. This is a vain random reach for justice disregardful of involved severity.

Doubtless through all sentient being there exists an instinctive sense named or misnamed justice; but it has a movable interpretation according to the man and the circumstances: it is a chimera in whose name unfair may appear as fair and wrong take on the guise of right. "Divine equity gives to the greater more and to the inferior less (supposedly) in proportion to the nature of each." "Justice is always the distribution of natural equity among unequals," but what human intelligence is sufficient for these things? Our human equity and clemency, esteemed equitable, must infract the strict rule of justice.

Notwithstanding the world-wide similarity in terminology of crimes there is great dissimilarity of the penalties attached; and, within the discretionary margin of the laws, different magistrates and the same magistrate at different times fortuitously change the notion of desert and vary penalties. Casual circumstances and personal peculiarities and moods so affect the judgment of men as to preclude uniformity of rule or practice. And so different is the experience of imprisonment upon different prisoners—one's privation another's privilege—that uniformity itself would subvert the intended equality. The blindfold image of justice is most appropriate, for it not only typifies the intended impartiality but also the impossibility for a correct adjustment of the scales.

It is believed that the nearest possible approach to criminal justice is reached unsought—when it is left to nature; that "according to the natural order of things, the way of the transgressor *is* (already) hard"; and, that nature's truest requital for every phase of morbidity—whether of the body, the mind, or the social



F. W. Broadway

status—is found in the necessary accompanying pains of the process of recovery.

Little reliance is placed in the deterrent principle alone for restraint of crimes or regulation of the conduct and character of offenders. No doubt the experience of pain and pleasure possesses a certain educational value, teaching what is profitable and the reverse; but fear is at best but the beginning of wisdom and fear always evidences and usually effects a reduced and inconstant mental condition. Welfare and adversity, antithetically related, supplement each other, but there is a wide difference of the mood and degree of stability when the one or the other is pursued. Avoiding adversity is as voyaging among reefs and breakers in fear of wreck, while pursuit of welfare is like following the charted ocean path voyaging wide at sea. Strong and virtuous characters, well established, do not need and are rarely conscious of amenability to existing penal laws; weak characters easily get themselves enmeshed and stranded; the habitually wayward are unmindful and disregardful of legal penalties; and the small ratio of all the criminals included in the class of deliberate and professional offenders brave penalties and derive zest therefrom.

The bulk of prisoners consists of those who are weak, habitually wayward, and unreflective persons—who do not readily connect, in consciousness, a present infelicitous experience with its remoter cause and consequence. Certainty and celerity of detection and arrest or sudden confrontment with an immediate menacing force may call the halt; but such temporary deterrence cannot effect a permanent change of habitual tendency.

Among the many thousands of this inconsiderate class of prisoners that I have investigated, none is now recalled to memory who, antecedent to his crime, took serious account of the possible consequences. And a habitual criminal, a fair type of his class, on his discharge remarked: "I mean now to quit, *if I get on all right*, but not because I am afraid of prison. I am a man who is never afraid." Such men are no more hindered from crimes by the liability to be imprisoned, than railroad travelers are hindered from traveling because there are occasionally fatal railroad accidents. The professional class feels imprisonment to be accidental rather than naturally consequential. One, worrying over his imprisonment because of its interference with his customary associations and excitements, solemnly said: "This is a judgment on me for leaving my own line.

So long as I kept steadily at the sneak line I was prospered, but when I tackled burglary my bad luck began."

Ineffective too, for deterrence, is the supposed disgrace of a criminal conviction and committal to prison. The generality of prisoners do not feel any disgrace. A certain tone of respectability colors the prisoner's conception of crime, which is partly a product of his knowledge of current commercial irregularities, corrupt partisan politics, frauds committed in high places with avoidance of convictions, and jubilant newspaper notices of crimes and criminals. The very notoriety gained compensates and so shields the shallow character from any painful feeling of disgrace. His insensibility and *sangfroid* are further ministered to by the effect of long-delayed trials and the character of the trial; illuminated newspaper detailed accounts of the prisoner's personal appearance and bearing; the gladiatorial show of the legal combat of which the prisoner forms the central figure; the artifice and insincerity of the defense; the excusing and even extolling address of the defending counsel; these together with the chummy attention of jail and court servitors, jail visitors, and salvation seekers, excite the prisoner's self-importance—a new and gratifying consciousness perhaps—displacing the imaginary feeling of disgrace which the inexperienced onlooker himself seems to see. All this show has, too, an evil influence on the common observant crowd. Deterrence is also diminished or destroyed by the previous habitual associations of the average prisoner. In his accustomed haunts, arrests, police-court arraignment, station-house and jail confinement are jokingly mentioned and often considered an interesting personal distinction. Even a color of the heroic tinges the habitué who has actually "done time."

Increased severities either of statutory penalties or conditions of imprisonment cannot evoke and entail a salutary deterrent influence. The history of criminal punishments, the world over, shows that the most crimes accompanied the greatest severity and that they diminished as mitigation took place. Only transitory effects are produced by severities. The public sense as it becomes familiar rises, in due time, to the new conditions—automatically adjusts itself, thus neutralizing the intended effect. And mere severity of the prison régime reacts upon the prisoners with actual, if unconscious, brutalizing effect with diminishing consciousness of apparent discomfort. Beyond the possible temporary stimulation of alternative pain and pleasure experiences, deterrent measures are disused and the deterrent principle itself is disesteemed.

That phase of altruism which, in exercise, holds benevolence to others in subordination to self-interest, is dominantly present in our prison system. This altruistic sentiment exists in the protective purpose of the law which establishes it, pervades the administrative polity in all its details, and gains impulse with its sympathetic reward in individual reclamations achieved. But in its active agency the principle is a rational characteristic, not a mere sentimentalism. It is devoted to prompt enduring welfare rather than passing enjoyments. The paramount object always in view is a collective benefit sought and wrought through the well-being of individuals, and the individual welfare through a better adjustment to ordinary communal relations. In use and inculcation it is ego-altruism, for the personified state seeks her own advantage, and the prisoners pursue, whether voluntarily or compulsorily, their own advancement. The benefits are mutual—an increase of ultimate mutual abiding happiness. The principle of the New York law, as of the other laws patterned after it, notwithstanding their marring limitations, constitutes a radical change of spirit in criminal jurisprudence. A distinguished jurist has publicly declared that the change "is destined to change men's habits of thought concerning crime and the attitude of society toward criminals; to rewrite from end to end every penal code in Christendom; and to modify and ennoble the fundamental law of every state." It is a change from a plane where feeling sways, to the loftier realm and reign of wisdom. It is conceded that no human agency can operate quite free from emotional influence, but the emotions are always a dangerous element in law-making and governing. To this vitiating source are traced the undue severities of all time, and also the supersentimentality which now is, perhaps, the most serious menace of our prison system. The true course is a restrained and rational altruism—a brooding beneficence, impartial, and ever striving to promote the interdependent collective and individual welfare, subordinating, as needs be, transitory pleasure to the more permanent and the nobler good.

The attitude of the state to our prison system is thus shown to be: negative as to any punitive intention; negative as to administering exact justice for its own sake; negative as to the expectation of deterrence by intimidation; neutral as to regulating the mystical individual moral relations of prisoners; and a qualified attitude as to altruism. The state's affirmative attitude will subsequently casually appear.

This better attitude on the part of the organized state effects

also a corresponding change of the relation of offenders toward the state. The change is real, though, for a time, it may not be prized by the prisoners or noticed by the administering authorities. Formerly, the fundamental relation was antagonistic—necessarily so, for under the definite-sentence plan the ever-present desire for release must be opposed by the prison government until expiration of the prescribed period of time. Now, under the new form of prison sentence, the desires of both parties are in accord—the prisoner wants to go and the government wishes the same; but only upon certain conditions. Here contradiction is likely to arise, but it soon of itself disappears, as regards the majority of prisoners, and the remainder of them, when they discern the peaceable fruits of the opposition, change to an accordance, which is often succeeded by a pleasing gratitude. While an outside observer might never note this changed relation by any change in the general appearance, it actually exists.

It is essentially the principle, "community of interest," which is the germinal basis of most of human concord. Its well-nigh magical effect is seen in states held in union under federal control; civil divisions of states bound in fealty to each other and the state government; communities made orderly; family integrity preserved; and it is seen in enduring common friendships of individuals. The inner shrine of community of interest is of course self-interest, but grown large enough to observe its outward dependence. Whenever self-interest is so wisely directed that self-indulgence is self-restrained in the interest of remoter better benefits; when individual consciousness enlarges to "colonial consciousness"; when the principle of interdependency dawns, then is born that mutuality which is indestructible and socially most desirable.

As to the "criminaloid" class distributed through communities, it is not expected that any striking demonstration or formal statistics shall soon reveal a decided change of attitude. But, with the certainty of cause and effect, improvement in tone and probity must occur in response to the new spirit of the criminal laws; the new purpose of the courts and court procedure; and to the renovated, more rational state-prison system; for to effect such changes necessitates a change in the general public sentiment, at once the final arbiter and most powerful molding social force.

AFFIRMATIVE PRINCIPLES

Under the indeterminate sentence it is intended, either by restraints or reformations, that prisoners once committed to our prisons shall then and thereafter be permanently withdrawn from the ranks of offenders. And the inherent evils of imprisonment are such that only genuine reformations can afford the intended protection.

To accomplish such protective reformations it is necessary, preliminarily, to fix upon the standard of reformatory requirement, to adopt the criterion, to organize and perfect the plan of procedure. The standard fixed is, simply, such habitual behavior, during actual and constructive custody, as fairly comports with the legitimate conduct of the orderly free social class to which the prisoner properly belongs in the community where he should and probably will dwell. The criterion of fitness for release is precisely the same performance subjected to tests while under prison tutelage by the merit and demerit marking system which, somewhat modified in strenuousness and with addition of its monetary valuations, is similar to the marking system of our National Military Academy; and tested, also, by proper supervision during a period of practical freedom while on parole. Both the standard and criterion must be somewhat pliant to meet the variant capacity of communities to absorb incongruous elements and because each prisoner must be fitted for his appropriate industrial and social niche.

It cannot too often be stated that prisoners are of inferior class and that our prison system is intended for treatment of defectives. Passing now, the somatic, psychic, and other anthropological data at hand in support of the above statement; premising that the defectiveness is of the bodily substance and form, in the mental capacity and its irregularity, and in emotional perversity, the aggregate of which in any large company of miscellaneous prisoners is always in excess of the defectiveness of the same number of free inhabitants; the inferiority of prisoners may, for the present convenience, be generalized under three divisions as follows:

1. Those who, in childhood and adolescence, are apparently normal, but closely scanned reveal peculiarities which, resulting in pernicious habits and crimes, develop later into some phase and degree of dementia.

2. Those clearly defective but with considerable normal mental power preserved. The mental defect is specific, in some one par-

ticular, such as the logical faculty. For instance, they are unable to master arithmetical examples which others of similar general intelligence easily grasp—they are deficient in judgment rather than depraved. At every trying crisis of life they are sure to "go wrong."

3. Those possessed of all the usual faculties except the regulative one, which is out of gear—not absent but disconnected and unavailable.

At the Elmira Reformatory when such inquiries were most searchingly made, it was discovered that out of the total inferior mass, numbering fifteen hundred men, five hundred were so very defective that they were temporarily withdrawn from the regular reformatory routine and were subjected to special renovating and stimulating treatment in order to bring them up to the standard of regular training.

Viewed *en masse*, prisoners are characterless; they lack positiveness, are without an inward dominant purpose. They are unduly influenced by instant, trivial circumstances, or by hidden transient impulses. The most dangerous, therefore interesting, sane young prisoner I have ever known, abnormally cunning, well illustrates this ungeared characteristic. He said, "I know, sometimes, I am what you call good and then again bad. In my good moods I am ashamed that I was ever bad; and equally in the bad mood I am ashamed of ever being good." His alternate self-disapprobation had no content of intellectual stability or moral responsibility. Although he was only eighteen years old, he was by heredity and habit a confirmed and desperate criminal. Fortunately he died while imprisoned.

Morbidity of body, mind, or the moral sense diminishes individual industrial efficiency and in turn narrows opportunity; leading on to indolence, privations, dissipation, and crimes. The source is held to be in physiological defects; the declaration of Ribot and other eminent psychologists is credited as true, that "The character is but the psychological expression of a certain organized body drawing from it its peculiar coloring, its special tone, its relative permanence." The nature and habit of living matter must exert such powerful influence upon volition that the conception of the individual will, dominating and unaffected by constituents and conditions of the total personality, is deemed no longer tenable. On the contrary it is confidently believed that, quite independent of the immediate conscious choice and will of the prisoner, agencies foreign to himself may be made effective to change his character; that the material living

substance of being is malleable under the simultaneous reciprocal play of scientifically directed bodily and mental exercises; and that the agencies are irresistible.

The doctrine of the interaction of body and mind is so well established and altogether reasonable that there is no need here to guard against a fancied materialistic tendency. Rather there is occasion to guard against too fanciful idealism. There may be a grain of truth in the remark of George Eliot: "In proportion as the thoughts of men are removed from the earth in which they live to an invisible world they are led to neglect their duty to each other." Dr. E. H. Hartwell says: "Bodily actions demand our first consideration since without them mental power, artistic feeling, and spiritual insight cannot be made to answer any earthly purpose." To this extent the principle of determinism is espoused; and unhesitatingly alleged free will is invaded. By rational procedure the social in place of antisocial tendencies are trained and made dominant. Thus the man is redeemed.

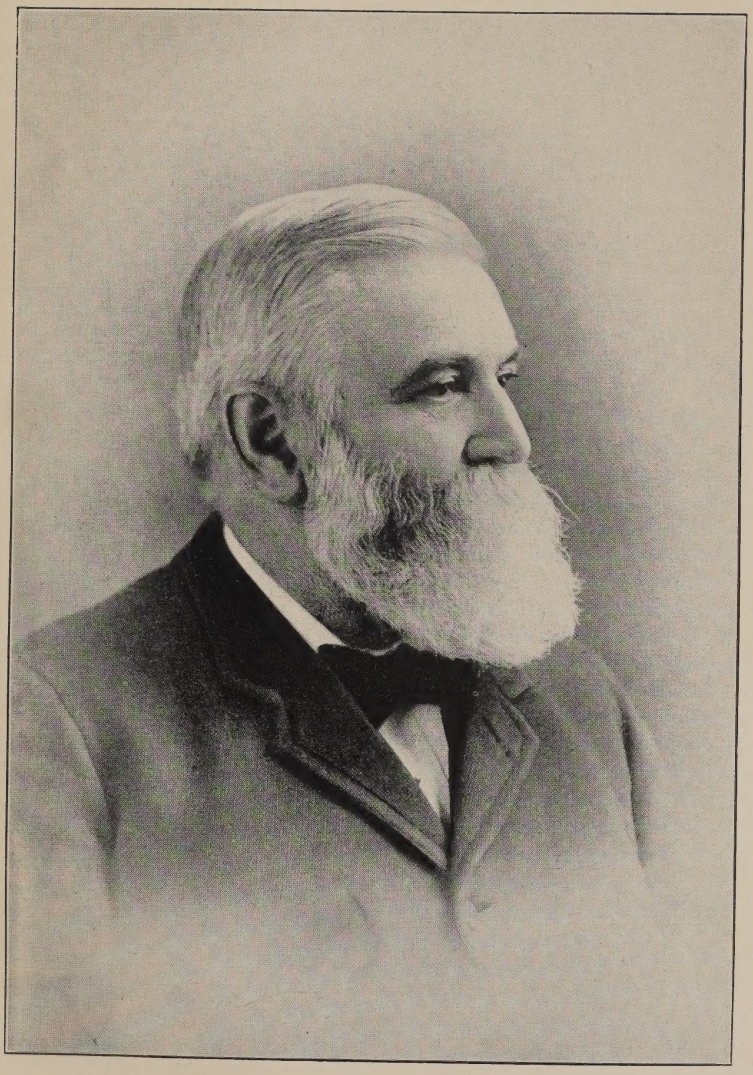
The original and preferable principle for organizing our reformatories is that of local-centralism. The state legislative control should be limited to a broadly outlined enabling act in harmony, of course, with the general state penological policy, but leaving much freedom of initiative to the local institutional authority—the board of managers. This local authority, in turn, had best limit its functions to fixing, changing, and supervising the administrative polity, leaving the immediate executive management to the resident chief officer—the prison governor. The governing principle of a reformatory must needs be, within certain constituted rights, of monarchical type, but exercised with much discretionary flexibility; approximately as a community under martial law, where both civic and military functions obtain. Such a blend is practicable and useful; indeed it is requisite.

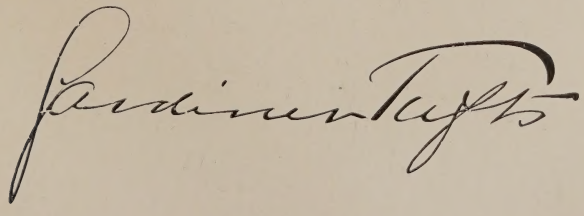
It is important that the subordinate staff shall remain subordinate; that each officer and employe shall confine his reformative activity to his own assigned specific duties. The chiefs of the several departments may properly constitute a coterie for the study of prison science, for consultations and advising, but they should each act entirely within his own particular sphere and under authoritative direction. And the rank and file of the staff should remain as the soldier, and never independently assume the rôle of the reformer. No outside training school for prison officers can ever supply a suitable reformatory prison staff. Both the selection and training of assist-

ants is best when controlled by the governing head of each reformatory. The civil service system wards off some improper demands for appointments but at the same time restricts the range of selection and hinders prompt sifting out of the unfit. Its serviceableness, however, preponderates.

So delicate and easily disturbed is the generative reformative process that outsiders—the would-be special philanthropists, professional religious revivalists, advertising salvationists—should generally be excluded; or if at all admitted to any participation, their ministrations should, under the direction of the governor, be made to fit into the established culture course. Even a resident official chaplain may inadvertently interfere with the germination of reformations. I have found the resident chaplain to be less desirable for religious ministrations than an itinerant service. One mind, and that the mind of the resident reformatory governor, must have and hold and wield every operating agency—impel, steady, and direct the whole and every item of the procedure. Such completeness of control requires an exacting and strenuous disciplinary régime which for effectiveness must include the principle and exercise of coercion.

A majority of prisoners instinctively respond to the inherent persuasion of the combined agencies; and of those who do not a majority readily respond to the moral coerciveness of the agencies. Some, only a small ratio, do not respond at first, except to some form of corporal coercion—some bodily inconvenience and discomfort. These, the irresponsive, who for the good of the prison community and for the public safety most need reformation, should not be neglected nor relegated to incorrigibility until every possible effort has unavailingly been made for their recovery. The advantages proffered are, naturally, not appreciated until availed of and enjoyed. Some cannot adopt and carry into execution measures calculated for their own good without the intervention of coercion. Adjustment to environment, even if it is compulsory, leads from the avoidance of bodily risks to the avoidance of social risks and thus to non-criminal habits, which, when duly formed, no longer need the prop of compulsion. "Compulsion first, then the sense of duty, automatic, the connection expanding into knowledge of ethical habit, then the habit creating conviction, then relations, then the capacity for general ideas." Thus coercion is often of initial indispensable educational value. Not infrequently prisoners who were assisted out of a stalled condition by means of an applied physical shock have expressed to the manager their grateful acknowledgments therefor. Many





such prisoners who without the physical treatment would have remained long in the ranks of the incorrigible have, after the simple treatment, developed well and ultimately established themselves in the confidence of their community as reliable, useful inhabitants.

There should be within the reformatory course a reserve of penological surgery similar in beneficent design and in scientific use to the minor surgery of the healing art of medicine.

THE PROCEDURE

Efficiency of the reformatory procedure depends on completeness of its mechanism composed of means and motives; on the force, balance, and skill with which the means and motives are brought to bear upon the mass, the groups, and the individual prisoners; and not a little on the pervading tone of the reformatory establishment. A mere enumeration of means and motives of the mechanism is, briefly, as follows:

1. The material structural establishment itself. This should be salubriously situated and, preferably, in a suburban locality. The general plan and arrangements should be those of the Auburn Prison System plan, but modified and modernized as at the Elmira Reformatory; and ten per cent of the cells might well be constructed like those in the Pennsylvania System structures. The whole should be supplied with suitable modern sanitary appliances and with abundance of natural and artificial light.

2. Clothing for the prisoners, not degradingly distinctive but uniform, yet fitly representing the respective grades or standing of the prisoners. Similarly as to the supply of bedding which, with rare exceptions, should include sheets and pillow slips. For the sake of health, self-respect, and the cultural influence of the general appearance, scrupulous cleanliness should be maintained and the prisoners kept appropriately groomed.

3. A liberal prison dietary designed to promote vigor. Deprivation of food, by a general regulation, for a penal purpose, is deprecated; it is a practice only tolerable in very exceptional instances as a tentative prison disciplinary measure. On the other hand, the giving of food privileges for favor or in return for some special serviceableness rendered to the prison authorities is inadvisable and usually becomes a troublesome precedent. More variety, better quality and service of foods for the higher grades of prisoners is serviceably allowable even to the extent of the *à la carte* method, whenever the prisoners, under the wage system, have the requisite

credit balance for such expenditure. Also, for some of the very lowest intractable prisoners, a special, scientifically adjusted dietary, with reference to the constituent nutritive quality, and as to quantities and manner of serving, may be used to lay a foundation for their improvement, otherwise unattainable.

4. All the modern appliances for scientific physical culture: a gymnasium completely equipped with baths and apparatus; and facilities for field athletics. On their first admission to the reformatory all are assigned to the gymnasium to be examined, renovated, and quickened; the more defective of them are longer detained, and the decadents are held under this physical treatment until the intended effect is accomplished. When the population of the Elmira Reformatory was 1,400, the daily attendance at the gymnasium averaged 429.

5. Facilities for special manual training sufficient for about one-third of the resident population. The aim is to aid educational advancement in the trades and school of letters. This special manual training, which at Elmira Reformatory included, at one time, 500 of the prisoners, covered in addition to other exercises in other departments mechanical and freehand drawing; sloyd in wood and metals; cardboard constructive form work; clay modeling; cabinet making; chipping and filing; and iron molding.

6. Trades instruction based on the needs and capacities of individual prisoners, conducted to a standard of perfect work and speed performance that insures the usual wage value to their services. When there are a thousand or more prisoners confined, thirty-six trades and branches of trades may be usefully taught.

7. A regimental military organization of the prisoners with a band of music, swords for officers, and dummy guns for the rank and file of prisoners. The military membership should include all the able bodied prisoners and all available citizens of the employes. The regular army tactics, drill, and daily dress parade should be observed.

8. School of letters with a curriculum that reaches from an adaptation of the kindergarten, and an elementary class in the English language for foreigners unacquainted with it, through various school grades up to the usual high-school course; and, in addition, special classes in college subjects and, limitedly, a popular lecture course touching biography, history, literature, ethics, with somewhat of science and philosophy.

9. A well-selected library for circulation, consultation, and

under proper supervision, for occasional semi-social use. The reading room may be made available for worthy and appreciative prisoners.

10. The weekly institutional newspaper, in lieu of all outside newspapers, edited and printed by the prisoners under due censorship.

11. Recreating and diverting entertainments for the mass of the population, provided in the great auditorium; not any vaudeville nor minstrel shows, but entertainments of such a class as the middle cultured people of a community would enjoy; stereopticon instructive exhibitions and explanations, vocal and instrumental music, and elocution, recitation, and oratory for inspiration and uplift.

12. Religious opportunities, optional, adapted to the hereditary, habitual and preferable denominational predilection of the individual prisoners.

13. Definitely planned, carefully directed, emotional occasions; not summoned, primarily, for either instruction, diversion, nor, specifically, for a common religious impression, but, figuratively, for a kind of irrigation. As a descending mountain torrent may irrigate and fertilize an arid plain, scour out the new channels, and change even the physical aspect, so emotional excitation may inundate the human personality with dangerous and deforming effect if misdirected; but when skilfully handled it may work salutary changes in consciousness, in character, and in that which is commonly thought to be the will. Esthetic delight verges on and enkindles the ethical sense, and ethical admiration tends to worthy adoration. The arts, which in essence are the external expression of the idea—the revelation of the reality—have too exclusively remained the heritage of the wealthy and wise; they must ultimately fulfil their God-given design—ennoblement of the common people. "We shall come upon the great canon 'art for man's sake' instead of the little canon 'art for art's sake.'" I have sufficiently experimented with music, pictures, and the drama, in aid of our rational reformatory endeavors, to affirm confidently that art may become an effective means in the scheme for reformation.

In addition to the foregoing items the prisoners are constantly under pressure of intense motives that bear directly upon the mind. The indeterminateness of the sentence breeds discontent, breeds purposefulness, and prompts to new exertion. Captivity, always irksome, is now unceasingly so because of the uncertainty of its

duration; because the duty and responsibility of shortening it and of modifying any undesirable present condition of it devolve upon the prisoner himself, and, again, because of the active exactions of the standard and criterion to which he must attain.

Naturally, these circumstances serve to arouse and rivet the attention upon the many matters of the daily conduct which so affect the rate of progress toward the coveted release. Such vigilance, so devoted, supplies a motive equivalent to that of the fixed idea. Then the vicissitudes of the daily experience incite to prudence; and the practice of prudence educates the understanding. Enlightenment thus acquired opens to view the attractive vista where truth and fairness dwell. Habitual careful attention with accompanying expectancy and appropriate exertion and resultant clarified vision constitute a habitus not consistent with criminal tendencies.

At present, owing to absence of exact knowledge of the modes of the mutual dependence of mind and body, it is not possible to wield, with perfect balance, the contingent means and motives, nor accurately adjust the operation of the scheduled elements of the joint composition—the total mechanism. But the fact of interdependence is so well established and so much of the method has been learned from experiment that the principles of mental physiology or physiological psychology should be applied in the reformatory procedure. It is uniformly conceded that the nervous system, centering in the brain, is the organ or instrument of the mind; that the mind is a real being which can be acted upon by the brain and which can act in the body through the brain. For the sake of the authority and simplicity of statement of this elementary biological truth I quote from Professor Ladd as follows:

"The mind behaves as it does because of the constitution and behavior of the molecules of the brain; and the brains behave as they do behave because of the nature and activities of the mind. Each acts in view of the other. The action of each accounts for the other. . . . The physical process consists in the action of the appropriate modes of physical energy upon the nervous and end-apparatus of sense, . . . brought to bear through mechanical contrivances carrying impulses to the mind. And psychical energies are transmuted into physiological processes—a nerve commotion within the nervous system thence propagated along the tracks and diffusing over the various areas of the nervous system."

This brief statement of the dual human constitution, the

condition of whose changeable and changing elements at any time so determines conduct, points to the possibility and so to the duty of effecting salutary alterations in the personality of prisoners by means of skilfully directed exercises of mind and body in harmonious mutual conjunction. If there exists a spiritual reality, neither brain nor mind, which manifests itself in both, it is beyond our ken, and the fact need not divert from or hinder rational efforts. For surely the best expression of such a force must be had when the mind and body are best conditioned. Doubtless changes of personality are more easily accomplished in the period of childhood and youth, but throughout the entire conscious life of a man there is no period when the citadel of the personality may not be taken by suitable siege.

A skilful, successful siege, while it encompasses the mass, must also reach to the groups and individual prisoners ministering with much particularity. This is practicable, even with the largest prison population. It is observed that the police of a municipality may know and influence the conduct of every inhabitant; that the "organization" of a political party knows the distinctive character of each elector and the agency effective to influence his political action; that at our National Military Academy the marking system reveals the idiosyncrasy of each cadet and gives reliable data for forecasting his career. In like manner the governing authority of a reformatory may and should have knowledge of each prisoner and, definitely, the use and effect of agencies directed for his advancement.

Such particularity is facilitated by group formations, great and small, composed of prisoners whose similar characteristics permit their treatment in group connection. In order to meet the several similarities the groups will form and reform and change kaleidoscopically, but always with prescribed order and precision of selections, so that in the round of groupings the special needs of each are duly treated. Fully a hundred such groups existed at the Elmira Reformatory within a general prison population of fifteen hundred, and the individualism helped to solidify and at the same time steady the mass to stand the necessary strain of the effective disciplinary régime then in vogue.

The words "necessary strain" are used advisedly. Stringency and strenuosity are indispensable principles of administration. Lax, superficial, or perfunctory administration easily transmutes the intended reformatory into a damaging instrument producing deformities instead. Strictness and strenuousness serve also to

counteract any possible injurious attractiveness of the unusual cultural opportunities and privileges the reformatory system involves. Not only a solidifying and steadying effect is wrought, but at the same time the irresponsive prisoners are sifted out and settled to their appropriate place.

Every separate reformatory institution has its own particular tone, derived originally from the central controlling individual, fed, fanned, and reflexively disseminated. This institutional tone is an impalpable something which, like the consensus of public opinion, is always a powerful determining factor. As the hundred instrumentalists of a great orchestra reach their highest excellence by inspiration of their leader, so the most effective reformatory work must have its tone of inspiration. It is the product of a quality rather than of external influences. Important as it is that the governing head should do and say the wisest things, it is of vastly more importance that he possess within himself the manly qualities and glowing interest which, when generally communicated, insure the best success. Such inwardness is self-propagative.

With the utmost confidence in the category of principles arrayed, and supplied with the completest reformatory mechanism, yet, when confronted with the duty to effect reformations, so lofty and complex is the problem, so delicate are the processes, and so much is the skill required, that it is not surprising if incredulity should arise. But when the problem is resolved into two essential elements it seems more simple. These elements are the formation of desirable habitudes, and development of individual economic efficiency.

The only useful knowledge we can have of the springs of character is to be derived from intelligent observation and true interpretation of the customary behavior. That every individual has characteristics fixed in his innate constitution or nature—a certain temperament and natural tendencies—cannot be denied. But external circumstances have already somewhat modified the original characteristics; and none can name the limit of further possible modifications to be effected by different circumstances and very different customary conduct. While the force of the original nature should not be utterly disregarded, and some regard must be had to the influence of exceptional flowering reason, new dominating tendencies like an acquired or second nature may be created.

Nature—custom—reason; the greatest of these is custom. Criminal behavior may but express a want of regulated channels

for the flow of vital force or lack of force. As the stagnant pools of a barren rivulet exhale malaria, and as the freshet serves to spread pollution, so a low rate of vitality may account for vagrant impulses, and, when under even normal pressure, insufficiency or irregularity of ducts of habit may produce pernicious conduct. Habit is formed by practice. By practice new nervous paths are made and connected. Movements of body and mind become more and more under conscious direction of the subject—from mere automatism through various stages until permanent change is wrought. Repeated efforts and movements which tend to produce right habits and, at the same time, disuse of every unsuitable activity, may become so fixed in the constitution that when any spring of action is touched, desirable action will follow and with reasonable certainty of result as a consequence of collaborated forces of mind and body. The degree of perfection of habit may be fairly estimated by the promptness and uniformity of the action responsive to the stimulus.

A signally distinguishing characteristic of the American Reformatory Prison System is the importance attached and the attention given to methodical treatment of the material organism for renovation—mayhap a little of refining effect and adjustment of sense to mind. Such physical training is believed to be a rational basal principle of reformatory procedure.

Another distinguishing feature, still more important because it is the germinal, all-embracing principle from which every progress proceeds, is the use of the economic motive and training to thriftiness. This principle, which is inherent in human nature and in the nature of things, plainly written in history, manifest in current affairs, present in every normal consciousness, the ground principle so long obscured from our educational systems and religious observances by reason of mediævalism and institutionalism, so blurred in our common life by excess and artifice, so misused in prison labor systems, is now rallied for its appropriate use in the scheme for reforming prisoners.

Successful legitimate industrial performance involves native or acquired capacity and disposition for useful work. This in turn demands such development of physical energy that exertion is pleasurable or not painful; it requires a degree of mechanical and mental integrity which verges on morality and, indeed, is of the same essential quality; there must be sufficient dexterity for competitions, and stability equivalent to reliability that insures a commercial value to the services. It is the observation of experience

that such an effect can be produced by industrial training; and, moreover, the possession of means, produced by exercise of the honest qualities made necessary to successful labor, conveys to the workmen a stimulus as of achievement, the ennoblement of proprietorship, and suggests some sense of solidarity of interests which prompts to prudence, thence to proper fraternity of feeling and conduct. After such a course of training and actual achievement, when the prisoner is sent out, on conditional release, to the situation arranged for him, possessed of his self-earned outfit of clothing, tools, and money, having left behind a margin of his savings to be added to from time to time or drawn upon to meet exigencies; after his sustained test on parole under the common circumstances of free inhabitancy; is he not, ordinarily, entitled to reasonable confidence that he will live and remain within the requirements of the laws?

The formation of such a new social habitude is an educational, therefore a gradual, process which requires time as well as practice. Whatever of real value may attend the preaching of disinterested benevolence to the outside general inhabitants, it is, as an independent agency, of little use for a community of common convicts. Such of them as might be moved by such an appeal are, usually, scarcely normal, and their responsive benevolent acts are likely to be injurious. Fellow-feeling for comrades may prompt to crimes, collusions, and public disorder.

The same may, properly, be said of prescriptive moral maxims, generally, and of the possible effects of personal entreaty. Also effort such as is commonly made to induce a habit of moral introspection, is believed to be a mistaken policy. The state standard of practical reformations is not the product of inward moral contrition; more naturally contrition is consequent on reformation. When reformation is accomplished contrition is useless and often harmful. It was deemed not an encouraging indication when, as occasionally happened, a prisoner on his admission to the reformatory, answering interrogatories, flippantly said, "I am going to reform"; not encouraging, because it showed no real purpose or some vague diverting notion of reformation quite aside from the real thing. The most hopeful response was felt to be when a desire was expressed and felt to learn some trade or income-giving occupation.

Moral suasion and religion are recognized as reformative agencies in our prison system, but no particular niche is prescribed for them such as is assigned to other agencies. Moral tone and the religious consciousness are flavoring qualities immediately penetrative.

They are attributes inherent in and emanative from the humblest as the noblest effort and exercise intended for any betterment.

Neither punishment nor precept nor both combined constitute the main reliance; but, instead, education by practice—education of the whole man, his capacity, his habits and tastes, by a rational procedure whose central motive and law of development are found in the industrial economies. This is a reversal of the usual contemplated order of effort for reformations—the building of character from the top down; the modern method builds from the bottom upward, and the substratum of the structure rests on work.

This better order of procedure is in accord with the method of human development foreshadowed by the allegorical scriptural Eden episode; and it does not preclude the highest aim and attainment. The far-reaching reformatory possibilities of work are admirably pointed out by Professor Drummond. I quote:

"Work is an incarnation of the unseen. In this loom man's soul is made. There is a subtle machinery behind it all, working while he is working, making or unmaking the unseen in him. Integrity, thoroughness, honesty, accuracy, conscientiousness, faithfulness, patience—these unseen things which complete a soul are woven into the work. Apart from work these things are not. As the conductor leads into our nerves the invisible force, so work conducts into our spirit all high forces of character, all essential qualities of life, truth in the inward parts. Ledgers and lexicons, business letters, domestic duties, striking of bargains, writing of examinations, handling of tools—these are the conductors of the Eternal! So much so that without them there is no Eternal. No man *dreams* integrity, accuracy, and so on. These things require their wire as much as electricity. The spiritual fluids and the electric fluids are under the same law; and messages of grace come along the lines of honest work to the soul, like the invisible message along the telegraph wires."

The principles of the American Reformatory Prison System as here set forth are as yet incompletely practiced; but, more and more, men are learning that the eternal verities are within the acts and incidents of the daily life; that the public safety turns upon a proper adjustment of individual and collective relativeness; and that the fulcrum of leverage is economic efficiency. This better view is fraught with promise for better public protection by means of rational reformation of offenders.

IV

POSSIBLE AND ACTUAL PENALTIES FOR CRIME*

By FREDERICK HOWARD WINES

TO give an account of the criminal codes of the United States, which should be at once intelligible, succinct, and exhaustive, would be an undertaking impossible to accomplish. Crime to a great extent is treated as a matter of purely local interest and importance. Each state and territory has its own code. Each code has been borrowed in part from some one or more of the codes already in force in other states, but modified to suit the views of the compilers. No two codes agree throughout, either in their definitions of crime or in the penalties prescribed for particular offenses. They contain internal evidence of their eclectic origin; and the successive stages in the evolution of criminal statutes might be historically traced, as comparative philologists trace the derivation of words from a limited number of primitive roots. Our statutes, founded upon the common law of England, contain many definitions and distinctions whose resemblance to their English originals is very remote.

Burglary, at the common law, is breaking and entering the dwelling of another by night with intent to commit a felony. This definition does not include (1) breaking without entering, (2) entering without breaking, (3) breaking, or entering, or breaking and entering a dwelling by day, (4) breaking or entering a building other than a dwelling, (5) breaking or entering a structure or inclosure

* In this paper the text of an article appended to the report, by Dr. Frederick Howard Wines, on crime, prepared for publication in the Eleventh U. S. Census (1890), has been reproduced. The volumes containing this report are not readily accessible to the general reader, but the bearing of the facts stated upon the question of definite versus indefinite sentences is so obvious and so important, that no apology is required for reprinting it here. It was meant to be illustrative and explanatory of the statistical tables showing the variations in sentences imposed by the courts and in the prescribed and average duration of imprisonment by states and territories, by sex, color, nativity and race, and by groups of crimes, separately and in combination with each other. These tables, of which there are twenty-seven, fill 90 quarto pages. Mr. Wines also furnished a separate tabular statement of the possible sentences for certain selected crimes, according to the codes in force in 1890, with an elaborate and extensive set of notes attached. The student who desires to go more deeply into this subject is referred to the original census volumes.

not a building, such as a car or boat. All of these acts are included in the popular conception of the word burglary, and that conception has passed into the technical phraseology of the statutes. The Oregon code, for instance, mentions "burglary in the night," "burglary by day," and "burglary not in a dwelling house." In Wyoming, burglary is "breaking and entering, or entering, any building or inclosure with intent to commit a felony;" if the intent is to commit a misdemeanor, the offense is characterized as simple housebreaking. The intent, in the common law, is an essential element of the crime, and it must be intent to commit a felony. But certain codes, like that of New Hampshire, confine it to certain felonious acts, such as murder, rape and robbery, while the majority add to the word felony the words "or larceny," which is perhaps the most common intention of all; and some, like that of New York, substitute the word "crime" for felony, thus including misdemeanors. In many states the fact that a burglar is armed, or makes an assault, or has a confederate present, is an aggravation of the offense, and subjects him to a higher penalty; in others this distinction is ignored.

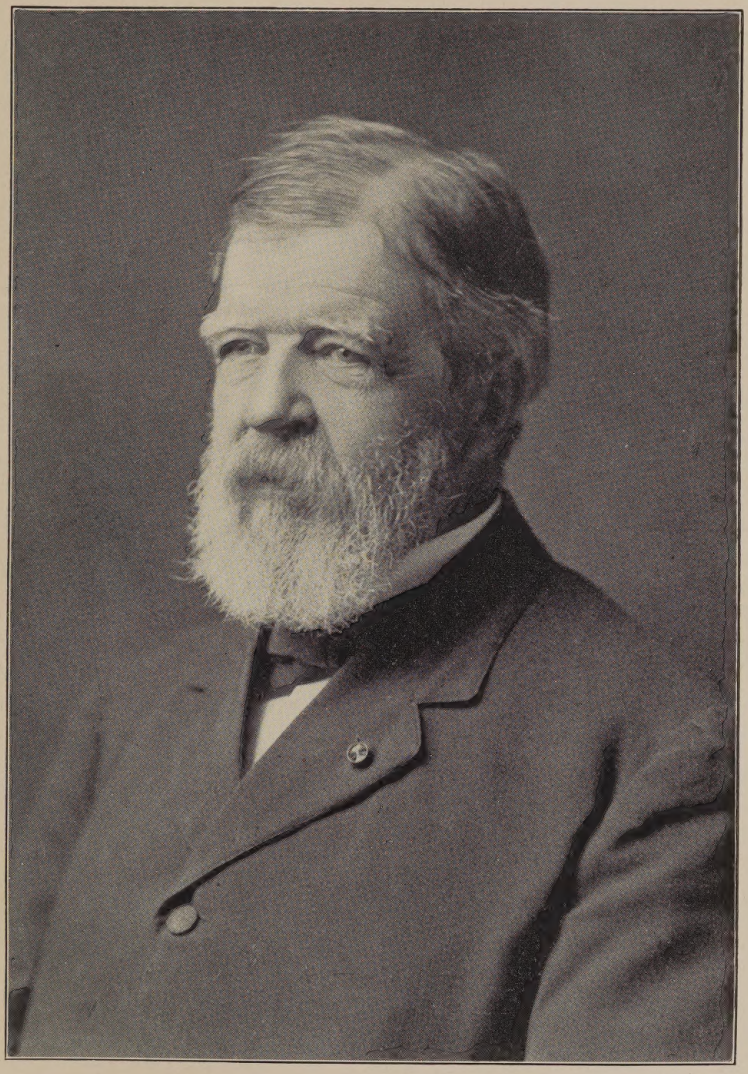
Arson, at the common law, is the malicious burning of the house of another, meaning by "house" a building, with its outbuildings, finished for habitation. This definition takes no notice of the intentional burning of one's own house, with intent to defraud the insurer or to hide a crime; nor of the burning of other property, as vessels, rolling stock, lumber, grain, fences, bridges, woods and prairies. Nor does it include the burning of buildings not designed for habitation, as mills, warehouses, shops, schools, churches, public buildings, and many others that might be mentioned. The statutes accordingly give very enlarged definitions of the word, which only partially agree with each other. In California, arson is said to be the wilful and malicious burning of any building with intent to destroy it; setting fire to other kinds of property is malicious mischief. Arson of an inhabited building in which there is at the time some human being, in that state, is arson in the first degree; all other kinds of arson are of the second degree. A specimen of another style of definition, in which a long list appears of different sorts of buildings and other property liable to conflagration, is given in the Indiana code. Much is made in some codes of the distinction between buildings within and buildings without the curtilage of a dwelling, but the majority do not refer to it.

Robbery, at the common law, is larceny committed by violence from the person of one put in fear. But the statutes of Missouri and

Kansas make the taking of the personal property of another from his person, or in his presence, by threatening future injury to his person or property or to the person of any relative or member of his family, robbery in the second degree, while robbery in the third degree is nothing more nor less than the offense commonly known as blackmail. The Delaware code makes a separate offense of robbery in a dwelling or on a public highway, with a special penalty. The distinction between robbery armed and unarmed, though not universal, is quite general.

These instances and others which might be given illustrate the difficulties which surround and encumber the correct interpretation of criminal statistics. Many of the crimes and misdemeanors enumerated in the census returns are unknown to the common law. The list of crimes in no two states is precisely the same. None of the codes are complete. There are laches and oversights in all of them. Offenses punishable in one state are not punishable in another, and the same word is not employed in all cases in the same sense. There are codes, for instance, in which the common distinction between grand and petit larceny is ignored or formally disavowed; and the codes in which it is recognized differ so widely in their characterization of the limit which separates the two that it is placed in Georgia at $1.00 and in Maine, Massachusetts, Florida, and New Mexico at $100.

This is the reason why statistics of crime need to be accompanied by a brief statement in outline of the requirements of the law which prisoners are charged with breaking, and of the extent of their resulting liabilities. Tables 123–131 of the Census of 1890 show the average duration of sentences of prisoners in the several states and territories. That average must measurably depend upon the power to punish confided to the courts. It is easy to compare the percentages of the total population in prison in the different states, but such comparisons prove nothing as to the social and moral condition of the people without examination of the lists of punishable offenses in each of them; and these again prove nothing until the average duration of sentence for each group of crimes is also known. The penalties authorized by legislatures and those pronounced by judges must bear some relation to each other, to give value to a criminal code as a general directory to criminal courts. The law and the figures must be read in conjunction, or the meaning of the figures will not be clear, and erroneous deductions from them are likely to be made.



Frederick N. Wines

Some comparisons have been made, in tabular form, between possible penalties under different codes. No exhaustive attempt has been made in this direction, but a few typical offenses have been selected, representing 60,000 prisoners, or three-fourths of the whole number. In the columns of the tables are the minimum and maximum terms of imprisonment prescribed by law—the limits of discretion allowed to the courts in the matter of sentence. The alternative penalties and additional penalties, other than imprisonment, are shown in the notes, which are necessarily numerous.

VARIATIONS IN FORM OF PENALTIES PRESCRIBED

The penalty for any offense may assume either of five typical forms: (1) imprisonment only; (2) fine only; (3) fine or imprisonment; (4) both imprisonment and fine; (5) fine or imprisonment, or both such fine and imprisonment. Each of these varieties of sentence is divisible into three subvarieties: those with a maximum but no minimum penalty, those with a minimum but no maximum, and those with both a minimum and a maximum limit. When there is no maximum limit to imprisonment stated, the natural limit is life. Some states exhibit a partiality for one or the other of these forms, but there are states in which all of them are in use at once.

IMPRISONMENT

In order to furnish a vivid idea of the great facility with which changes can be rung upon so few and such simple elements, attention is called to the following list of terms of imprisonment in the tables:

(1) Maximum terms with no minimum: 10 days, 20 days, 30 days, 1 month, 60 days, 2 months, 90 days, 3 months, 6 months, 1 year, 2 years, 3 years, 5 years, 6 years, 7 years, 10 years, 12 years, 14 years, 15 years, 20 years, 21 years, 25 years, 30 years, life.

(2) Minimum terms with no maximum: 20 days, 30 days, 6 months. (The maximum in these cases cannot be assumed to be life.)

(3) Minimum and maximum terms: 5 days to 20 days; 10 days to 30 or 50 or 60 or 90 days, or to 6 months; 24 days to 1 year; 1 month to 3 or 6 months, or to 1 year; 60 days to 6 months, or to 1 year; 2 months to 1 year; 3 months to 6 months, or to 1 or 2 or 10 years; 4 months to 10 years; 6 months to 1 or 2 or 3 or 5 or 7 years; 1 year to 2 or 3 or 4 or 5 or 7 or 10 or 14 or 15 years, or life; 18 months to 9 or 21 years; 2 years to 4 or 5 or 10 or 15 or 20 or 21 or 25 years, or life; 3 years to 9 or 10 or 15 or 18 or 20 years, or life; 4

years to 7 or 8 or 10 years, or life; 5 years to 10 or 15 or 20 or 21 or 30 or 60 years, or life; 7 years to 20 years; 10 years to 20 or 21 years, or life.

Fines

Attention is further called to the following list of fines in the notes to the tables:

(1) Maximum fines with no minimum: $10, $20, $25, $30, $50, $100, $200, $250, $300, $500, $600, $800, $1,000, $2,000, $2,500, $4,000, $5,000, $10,000, $20,000.

(2) Minimum fines with no maximum: $10, $20, $100, $200, $300, $500, $1,000, $10,000.

(3) Minimum and maximum fines: $1 to $20 or $100; $3 to $100; $5 to $20 or $25 or $50 or $100 or $500; $10 to $25 or $50 or $100 or $300 or $500 or $1,000; $20 to $50 or $100; $25 to $100 or $1,000; $30 to $500; $50 to $150 or $200 or $250 or $300 or $500 or $1,000; $100 to $300 or $500 or $1,000; $200 to $500 or $1,000; $250 to $1,000; $300 to $500 or $1,000; $400 to $1,000 or $2,000; $500 to $1,000 or $2,000 or $5,000 or $10,000; $1,000 to $5,000 or $10,000.

A Mathematical Problem

The subject thus presented offers for the consideration of mathematicians a somewhat formidable problem in permutation. Given, 24 maximum and 3 minimum terms of imprisonment, with 64 variable terms with definite maximum and minimum limits; also 19 maximum and 8 minimum fines, with 42 variable fines with definite maximum and minimum limits. Required, answers to the two following questions: first, In how many ways might these be combined by the framers of criminal codes in the five typical forms mentioned above? and second, How many different individual sentences might be pronounced upon convicted prisoners under the thousands of possible paragraphs or sections which might be devised by the literary ingenuity of the aforesaid legal authors?

Fine and Imprisonment

The modifications of sentence to simple imprisonment by the introduction of the element of fine, as has been intimated, assume two forms; namely, fine as a substitute for imprisonment and fine as an addition to imprisonment. In either form the law may be, and sometimes is, so framed as to admit of the commutation of fine into imprisonment at a fixed rate, commonly, perhaps, on the basis of

the equivalence of one day in custody and $1.00 in cash. Where this is the case, the fine imposed is in effect a prolongation of sentence, and would to that extent increase the averages stated in the table. If some other mode of discharging an impecunious convict is devised, instead of requiring him to work out his fine, the fact remains that a light sentence to prison and a heavy fine might be for many men a more severe punishment than a longer term without this addition. In estimating the comparative severity of different codes, this fact must be borne in mind. It will not answer, from any point of view, to concentrate one's whole attention upon the question of imprisonment alone.

In Europe there has been much discussion of the "scale of penalties," a phrase unfamiliar to American ears. We have a scale, as may be inferred, but it can hardly be said to be graduated with mathematical precision.

Codes with fixed penalties, like the Code Napoleon, accept, on behalf of the legislative branch of the government, the responsibility of apportioning punishment to supposed guilt. The majority of our codes throw this responsibility upon the judicial department, but in varying measure.

Supplementary Penalties

But the latitude left to judges and juries has not yet been fully stated. In a number of states, notably in Massachusetts, Michigan and Mississippi, the courts are offered their choice, for certain crimes, between sentences to imprisonment in the state prison or penitentiary and sentences to imprisonment in the county jail. In Alabama and some other southern states, prisoners may even be sentenced to hard labor outside of prison walls, upon plantations or roads or public works. There are additions to imprisonment in other forms, such as disfranchisement and disqualification for office as a witness; and, in Delaware, the pillory and the whipping post. In Rhode Island, every person convicted of murder or arson is thereupon deemed in law to be dead, with respect to all rights of property, to the bond of matrimony, and to all civil rights and relations of whatever nature, as if his natural death had taken place at the time of such conviction. In that state, if any person is sentenced to imprisonment in the state prison for life or for any term of years not less than seven, any creditor may apply to the probate court for settlement of his estate, and letters of administration issue upon such request. In Maryland, parties who marry within the prohibited

degrees of consanguinity may be banished from the state. The principle of restitution in cases of crimes against property has been engrafted upon several codes, including those of Delaware, Maryland, and Louisiana.

Sentences are further modified, and their average duration is prolonged, by various provisions as to second and subsequent convictions. Such provisions may be general, or they may be limited in their application to specified offenses. On the other hand, the total amount of imprisonment is not quite so great as it would appear from Tables 114–122 to be, since commutation of sentence, on a fixed scale, as a reward for good conduct in prison, is nearly everywhere the prisoner's right, under what are familiarly known as "good time" laws. Where the indeterminate sentence has found its way into any criminal code, the term of sentence stated in the census returns is the maximum term which might have been imposed for the crimes specified, and this also increases the apparent average duration of sentence in the states which have such codes. This is especially true of New York, with its immense reformatory prison at Elmira.

The whole or a part of a sentence may be to solitary confinement, or the prisoner may be sentenced to be fed on bread and water.

These are further illustrations of the difficulties which surround and encumber the interpretation of criminal statistics. To reduce this mass of confused and conflicting provisions to anything like order or system is a vexatious and wearisome task, in which a moderate degree of success is all that can be reasonably hoped for.

But one of the most striking results of the comparative study of possible sentences for crime is the conviction which it inevitably produces, that criminal law is unequally applied. This may be seen in the tables; first, by an examination of the different penalties in the different states for the same offenses, and second, by a comparison of the penalties for different offenses.

VARIATIONS IN SEVERITY OF PENALTIES PRESCRIBED

It is commonly said that the end sought in the punishment, so-called, of criminals is the protection of society. But injustice to prisoners in the name of the law would be an assault upon the basis of all righteous government. It must therefore be assumed that the criminal law is designed to be just. In other words, it consciously inflicts upon no man a greater amount of suffering than the crime which he has committed merits. The penalties contained in any code are the expression of the moral sense of the turpitude of crime

in the minds of those by whom it was adopted and is continued in force. They constitute the only legal measure of possible guilt, leaving the question of actual guilt in each particular instance to the determination of the proper judicial tribunals. It follows that the important point to be considered in any examination of them is the maximum penalties. The minimum penalties are not to be overlooked or disregarded. But the statement of any minimum is comparatively rare.

The maximum penalty for counterfeiting in Delaware is three years; in Maine, Massachusetts, New York, Florida and Michigan it is imprisonment for life. The minimum penalty in Missouri is five years, which is the maximum in Connecticut.

The maximum penalty for perjury in New Hampshire, Connecticut, and Kentucky is five years; in Maine, Mississippi, and Iowa it is imprisonment for life; in Missouri it is death, if the witness designs thereby to effect the execution of an innocent person. In Delaware, on the other hand, perjury is punishable by fine, without imprisonment, not less than $500 nor more than $2,000.

The maximum penalty for incest in Virginia is six months; in Louisiana the minimum penalty is imprisonment for life; in Delaware the penalty is a simple fine of $100.

The maximum penalty for bigamy ranges all the way from one year in Delaware to twenty-one years in Tennessee.

The maximum penalty for rape in New Jersey and Pennsylvania is fifteen years; in Delaware, North Carolina and Louisiana the penalty is absolute and is death.

The maximum penalty for mayhem in Colorado is three years; in Vermont it is imprisonment for life. In Georgia, putting out one eye or slitting or biting off the nose or lip is a misdemeanor, for which the punishment cannot exceed six months in jail, a year in the county chain gang, and a fine of $1,000. On the other hand, the penalty in Georgia for castration is death, but may be commuted by the jury to imprisonment for life.

The maximum penalty for assault with intent to commit rape in Pennsylvania and Kansas is five years; in Massachusetts it is imprisonment for life.

The maximum penalty for arson of an occupied dwelling by night in Connecticut, Arkansas, Wyoming, Colorado and Washington is ten years; in Delaware, Virginia, North Carolina, and Louisiana the penalty is absolute and is death.

The maximum penalty for arson, in the daytime, of a building

not a dwelling and without the curtilage of any dwelling, in Kansas is four years; in Maryland, South Carolina, and Georgia, it is death.

The maximum penalty for arson with intent to defraud insurer in Alabama is one year; in Maine the minimum penalty for the same offense is imprisonment for life.

The maximum penalty for breaking and entering a dwelling by night in Arkansas is seven years; in North Carolina the penalty is absolute and is death; in Louisiana it is death, if the burglar is armed or makes an assault; also in Delaware, if the intent is to commit murder, rape, or arson.

The maximum penalty for grand larceny varies from two years in Louisiana and New Mexico to twenty years in Connecticut.

The maximum penalty for forgery varies from three years in Delaware to imprisonment for life in New York and Missouri.

If guilt is measured by penalty, the absence of any accepted standard of measurement is thus a matter of mathematical demonstration.

Still more diverse are the relative estimates of different crimes in the different codes. In the statements which follow, guilt is measured by the maximum penalty for each offense prescribed in the statutes:

The guilt of counterfeiting in Ohio and Minnesota is twice that of perjury, but in Rhode Island and Alabama the guilt of perjury is twice that of counterfeiting.

The guilt of perjury in Indiana is to that of incest as 21 to 5, but in Kentucky the guilt of incest is to that of perjury as 21 to 5.

The guilt of rape in New York is twice that of incest, but three times in Wisconsin, Minnesota, and Kansas, four times in Vermont, five times in Pennsylvania, ten times in New Hampshire, and thirty times in New Mexico.

Delaware, Virginia, Georgia, New Mexico, and Oregon are the only states in which bigamy is regarded as a higher crime than incest. In Virginia the maximum penalty for bigamy is eight years, but for incest only six months, while in Wyoming and Colorado the maximum penalty for incest is twenty years, but for bigamy two years.

The guilt of assault to kill in Mississippi is five times that of assault to rape, but in Delaware and Georgia the guilt of assault to rape is twice that of assault to kill. Assault to kill is punishable in Vermont, Connecticut, Michigan and Arizona by imprisonment for life, and assault to rape by different terms of years, but in Massa-

chusetts assault to rape is punishable by imprisonment for life and assault to kill by imprisonment for one year.

The guilt of mayhem in Ohio is twice that of burglary, but in Michigan the guilt of burglary is twice that of mayhem.

The guilt of arson in Pennsylvania, Ohio, Nebraska, and Kentucky is twice that of burglary, but in Connecticut the guilt of burglary is twice that of arson.

The guilt of burglary in Kentucky and Alabama is twice that of larceny, but three times in Wisconsin and Mississippi, four times in Georgia and Michigan, five times in New Hampshire, and six times in New Mexico.

The guilt of robbery in Vermont, New York, Delaware, Wisconsin, Minnesota, Kentucky, Mississippi and Oregon is twice that of larceny, but three times in Arkansas, four times in Georgia, Florida and Iowa, five times in New Mexico, six times in New Hampshire, and seven times in Louisiana.

The guilt of burglary in Texas is to that of forgery as 12 to 7, but in Arkansas the guilt of forgery is to that of burglary as 15 to 7.

The guilt of forgery in Kansas is four times that of larceny, but in Connecticut the guilt of larceny is four times that of forgery.

With the exception of murder, the highest three crimes in New Hampshire and Alabama are rape, arson, and robbery; in Delaware and West Virginia, rape, arson, and burglary; in Indiana, rape, arson, and the embezzlement of public funds; in Mississippi, rape, arson and administering poison.

The highest two crimes in Virginia, with the exception of murder, are rape and arson; in Minnesota, arson and burglary; in Nebraska, Wyoming, and Colorado, crime against nature and rape; in Utah, rape and administering poison.

The highest crime in New Jersey, except murder, is the crime against nature; in Pennsylvania and Maryland, arson; in Ohio, Illinois, Wisconsin, Kentucky, Texas, Tennessee, Arkansas, Washington, and Oregon, rape.

Imprisonment for Life

Still omitting all reference to homicide, the maximum penalty for crimes named is imprisonment for life in the following states:

In Massachusetts, for counterfeiting, rape, assault with intent

to rape, poisoning a well or spring, arson, burglary, robbery, and embezzlement of public funds.

In Maine, for counterfeiting, perjury, rape, arson, burglary, and robbery.

In Rhode Island, for rape, administering poison, poisoning a well or spring, arson, burglary, and robbery.

In Michigan, for counterfeiting, rape, assault with intent to kill, administering poison, poisoning a well or spring, and robbery.

In Missouri, for the crime against nature, arson, burglary, robbery, and forgery.

In Nevada, Idaho, and Colorado, for the crime against nature, rape, administering poison, arson, and burglary.

In Arizona, for rape, assault with intent to kill, administering poison, arson and burglary.

In Vermont, for mayhem, assault with intent to kill, arson, and burglary.

In New York, for counterfeiting, arson, burglary, and forgery.

In Florida, for counterfeiting, poisoning a well or spring, arson and burglary.

In Iowa, for perjury, rape, arson, and burglary.

In Connecticut, for the crime against nature, rape, assault with intent to kill, and administering poison.

In New Mexico, for the crime against nature, administering poison, poisoning a well or spring, and dueling.

In Montana, for the crime against nature, rape, and administering poison.

In Mississippi, for perjury and administering poison.

In Louisiana, for incest and the crime against nature.

In Nebraska, Wyoming, and Colorado, for the crime against nature and rape.

In Utah, for rape and administering poison.

In Minnesota, for arson and burglary.

In Georgia, for the crime against nature.

In Ohio, Illinois, Washington, and Oregon, for rape.

In Arkansas, for dueling.

In South Carolina, for burglary.

In West Virginia and Texas, for robbery.

In North Carolina, for the embezzlement of public funds.

In the remaining states, namely, New Hampshire, New Jersey, Pennsylvania, Indiana, Wisconsin, and Kansas, life sentences are not authorized by law, except for murder and manslaughter.

Death

The death penalty is in force in the following states for the crimes named.

For murder in all the states except Rhode Island, Michigan, and Wisconsin.

In Louisiana, for rape, assault with intent to kill, administering poison, arson, and burglary.

In Delaware and North Carolina, for rape, arson, and burglary.

In Alabama, for rape, arson, and robbery.

In Georgia, for rape, mayhem, and arson.

In Missouri, for perjury and rape.

In Virginia, West Virginia, South Carolina, and Mississippi, for rape and arson.

In Florida, Kentucky, Tennessee, Texas, and Arkansas, for rape.

In Montana, for arson of dwelling by night.

In Maryland, for any variety of arson.

POSSIBLE AND ACTUAL PENALTIES

In order to obtain a complete view of the relations of crime and punishment, the possible sentence authorized by the codes must be compared with the actual sentences imposed by the courts. For this purpose the average sentences for different crimes in the different states are given in Table 123.* A table is also submitted which shows in addition, for certain offenses, in parallel columns, the maximum penalty authorized by law, the highest and the lowest sentence pronounced by the courts, and the average for all prisoners in confinement in each state on that particular charge, June 1, 1890.

Generally speaking, the approximations to equality in the apportionment of actual sentences are greater than in the case of possible sentences. For instance, while the possible (maximum) sentence for perjury ranges from five years to life, the actual average sentences imposed (omitting sentences for life) range from one year in Maine to ten years in Florida. The possible sentences for incest range from six months to life, but the actual average sentences from one year in Pennsylvania to fifteen years in Louisiana. The possible sentences for the crime against nature range from five years to life, but the actual average sentences from one year in West Virginia and Utah to eleven years and nine months in California.

*See Census Report, 1900.

The possible sentences for bigamy range from one year in Delaware to twenty-one years in Tennessee, but the actual average sentences from four months in Montana to four years and three months in Minnesota. The possible sentences for rape range from fifteen years to death, but the actual average sentences from two years in Louisiana (where the maximum penalty is death) to thirty-three years and six months in New Mexico.

The possible sentences for arson range from ten years to death, but the actual average sentences from two years in Arkansas to seventeen years and six months in Rhode Island.

The possible sentences for burglary range from seven years to death, but the actual average sentences from one year and six months in New Mexico to eight years and four months in Georgia.

The possible sentences for robbery range from six years to life, but the actual average sentences from one year and nine months in Delaware to twenty-two years in Alabama.

The possible sentences for larceny range from two to twenty years, but the actual average sentences from 1.136 years in Delaware to 5.556 in Texas.*

The possible sentences for forgery range from three years to life, but the actual average sentences from one year and six months in Arizona to seven years in New York.

In the foregoing statement it will be understood that the averages stated in Table 123† can only be computed from term sentences, and that the sentences to imprisonment for life or to suffer execution are not included. If an arbitrary figure, based on the ages of prisoners at the time of conviction and their expectation of life, could be substituted for life sentences, the averages would be much greater than they appear from that table to be.

Average Sentences

It will be seen that in almost all cases the average term sentence imposed by the courts is far below the maximum penalty authorized by the statutes. There are some exceptions, as may be seen by consulting the columns for the crime of incest, where the maximum penalty and the average sentence are identical for Arizona, Nevada, Oregon, and California. The contrast between the maximum pen-

* The District of Columbia is omitted from this statement, because prisoners sentenced for grand larceny in the District are sent elsewhere to undergo their sentence of imprisonment, and the average stated in the table is for petit larceny only.

† In Census Report, 1900.

alty and the actual average sentence in other cases is very striking, of which the following instances may be mentioned; in Maine, the maximum penalty for perjury is imprisonment for life, but the actual average sentence is one year. It would be fairer, however, to take cases in which the maximum penalty is a sentence for a definite term of years rather than for life, and attention may be called to the maximum penalty for the crime against nature in Mississippi, which is ten years, and the actual average sentence, which is one year; to the maximum penalty for burglary in New Mexico, which is twelve years, and the actual average sentence, which is one year and six months, and to the maximum penalty for forgery in Arizona, which is fourteen years, while the actual average sentence is one year and six months.

The inequality of average sentences for the same offense in different states is also noticeable. The average sentence for perjury in New York is more than double that in New Jersey, and in Florida it is double that in Georgia. The average sentence for incest in Massachusetts is twice that in New Hampshire and ten times that in Pennsylvania. The average sentence for the crime against nature in North Carolina is nine times that in West Virginia, in Alabama five times that in Mississippi, and in Washington twice that in Oregon. The average sentence for bigamy in New York is more than double that in Pennsylvania or Connecticut. The average sentence for rape in Mississippi is six times, and in Texas twelve times, that in Louisiana; in New Mexico it is more than three times that in Arizona, and in California more than five times that in Washington.

The average sentence for arson in New Hampshire is nearly double that in Vermont, in Texas more than three times that in Arkansas, and in Rhode Island about four times that in Pennsylvania.

The average sentence for burglary in California is more than double that in Arizona, and in Vermont more than four times that in Rhode Island.

The average sentence for robbery is less than one year in California, but more than nineteen years in Arizona; and in Alabama four times that in Mississippi.

The average sentence for larceny in Maryland is double that in Delaware, and in Texas three times that in Louisiana.

The average sentence for forgery in Minnesota is more than double that in Wisconsin, and in New York more than double that

in New Hampshire or Pennsylvania. Similar instances might be greatly multiplied.

Evidently part of this apparent inequality in the distribution of punishment is due to differences in the circumstances which attended and characterized the commission of the offenses, which were duly taken into account by the courts before which the offenders were tried. Part of it is also explicable on the theory that in some states the number of offenders is so small that the averages stated are of little value.

The value of the table of possible sentences lies in the fact that it gives to students the variations in the codes of the states, in concrete form, and the table is not meant for practical use by lawyers. Any minor errors which may be discovered will not invalidate the value of the table for the purpose for which it was made.

V

SAMUEL JUNE BARROWS

By PAUL U. KELLOGG

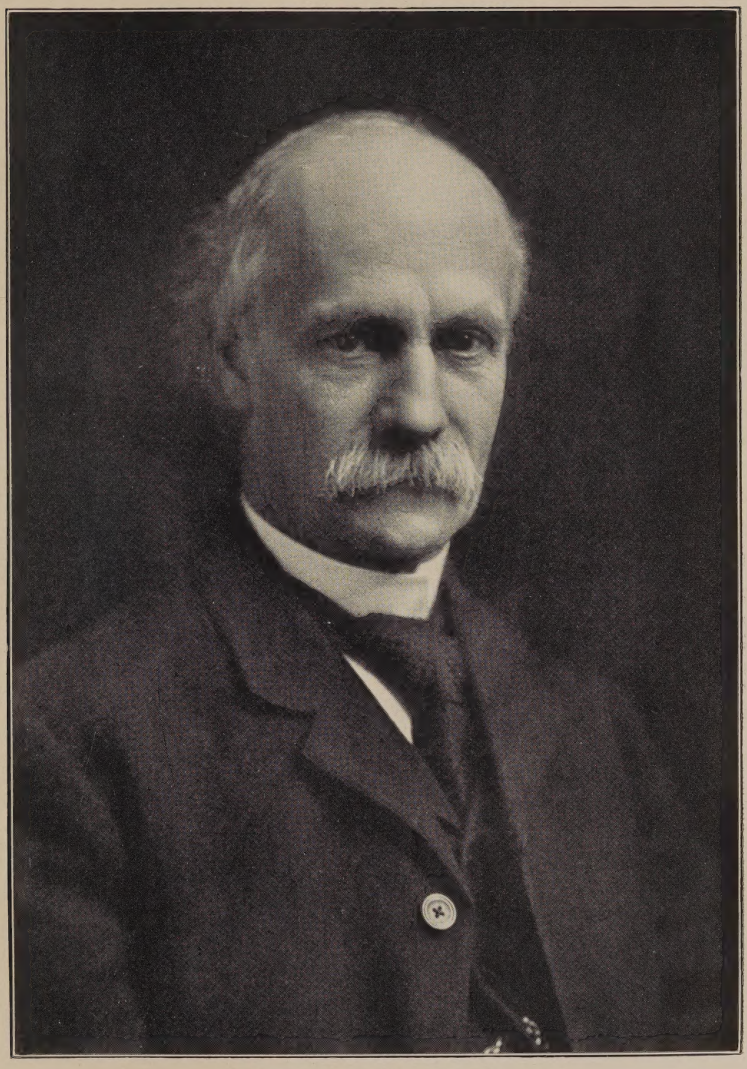
IN his verses on Life and Song, Sidney Lanier, the poet of our South-land, lamented that the singer had not yet come who should wholly live his minstrelsy,—live it as if life were caught by a clarionet and its heart were utterly bodied forth in the throbbing of the reed. Last year, one evening in May, the Oratorio Society and the Prison Association of New York united in a service at Mendelssohn Hall commemorative of Samuel June Barrows. The splendid choruses in which for years he had lifted up his voice were interspersed by addresses telling of him as the helper of prisoners, the lover of letters, the lover of justice, the man of peace, the shepherd of souls. These were so many aspects of a life, long and full, which had loosened many of those fetters that bind men to misery (such as crime, bigotry, war and race hatred), and which, in turn, had forged strong, radiant links with music and the other joys of creation. For it was more nearly true of him than of most men, that "his song was only living aloud; his work, a singing with his hand."

Mr. Barrows died of pneumonia on April 21, 1909, at the Presbyterian Hospital, New York. The illness came suddenly in the flood-tide of the year's work; and his very loyalty to the public duties thick upon him, made him loath to be reconciled in laying them down. "I think it is hard to die like a saint," he said. "I am content to die without a crown, just as a decent man." In that way, also, had he lived, simply, unpretendingly, just as a decent man. Yet the International Prison Congress, in assembling in Washington in 1910, meets without its elected president—the first American to be called to the chair of this world's conference. Delegates speaking various tongues and standing high in the councils of the great governments, will mourn not only a fellow member but a friend well nigh as intimate and personal to them as, fifty years before, he had been

to the working boys of an East Side night school, who without leave or precedent gave "nine cheers for Barrows" when he left their class. And convicts in the great Federal prisons, shuffling Negroes in the chain gangs of the South, parolemen granted a new chance in life by Australian law he had influenced, children before the new juvenile courts of France, sick men in the disease-beset cell-blocks of our older penitentiaries, young offenders locked in with the hardened rounders of obscure county jails, fair men and women caught in the ignoble meshes of old laws and tyrannies,—all these lost a friend, as surely as their lot, and that of their kind for generations to come, is bound to be influenced by the causes he substantially advanced.

Mr. Barrows's last piece of self-sacrifice was for such a one,—in prison, to be visited though it were at the ends of the world. In March, Mrs. Barrows had set out for St. Petersburg in behalf of Madame Breshkovsky, one of the heroic noblewomen of the Russian revolutionary movement, who in her seventieth year lay sick in the fortress of St. Peter and St. Paul. "I should be glad to give my life for Babushka," he had said, as his wife started alone on this emergent mission to Russia, "and would count it well spent. I cannot go; I think you should go." The cables carried word of his sickness to Mrs. Barrows, but the fastest steamers were unable to bring her back to the United States before his death. We may have faith, however, that husband and wife were not at the last denied such communion as finds expression in Mr. Barrows's stanzas, "The Wireless Message." In boyhood he had operated the key of one of the first telegraph instruments in use, and fifty years later, when they were last on the ocean together, he had written these verses in eager recognition of the second great conquest of space through electricity. He was quick to catch the glint of the universal and spiritual in its meaning; but in a very personal way, also, his words seem to have been half-prophetic of the hours of separation, of yearning and of diminishing strength, when his heart was to reach out over the seas they were then traversing toward the answering chords of her spirit.

Electric pulses through the viewless air
Pitched to some distant tone,
With ardent zeal their voiceless message bear
Through the ethereal zone,
And at some tuned, receptive point remote,
They find their kindred note.



S. J. Barrows.

Self-poised on high the towers of the soul
Some distant message wait.
Magnetic pulses speed from pole to pole,
Swift to affiliate;
But thou, my soul, to gain this wished-for boon,
Must keep thyself in tune.

Love flashes in the open, shoreless sky,
Pathway of God and man,
The burning question and the swift reply.
Shall I the message scan?
And shall I find as these swift pulses dart
Some message for my heart?

Mrs. Barrows recrossed the ocean less than three months after her husband's death and took up once more the mission to which they had jointly pledged her best efforts. She pleaded before the highest officials of the Czar the cause of the unflinching, white-haired prisoner, whose burning message of a people oppressed had stirred the swift pulses of America. "Sir," said the petitioner, "by a strange coincidence it was my husband who presented to the Russian Ambassador the petition in behalf of Mr. Tchaikovsky, which you were good enough to grant.* As my husband, the man, pleaded for the man, so I, the woman, come to plead for the woman."

Madame Breshkovsky was transferred to one of the better cells in the fortress, and later, was exiled to the penal settlements of Siberia instead of to hard labor in prison,—concessions which the activity of friends in other countries may have influenced, and not the least among them, this "little old lady who had traveled 10,000 miles" once, and again a second time, and who in her undaunted widowhood had ventured into the Island Palace on the Neva. In Babushka's age and exile may the devotion of these two, the simpler tragedy of whose lives was thus bound up in hers, abide with her! May it be to her surety of those "love flashes in the open shoreless sky" which go with her from the bruised hearts of the common people of all the Russias. As a part in Mr. Barrows's life, these were more than the chance incidents of a closing chapter. Love and brotherhood no less than justice were the mainsprings of his being.

* In 1909 the editors of *The Outlook* and Samuel J. Barrows carried a petition to the Russian Ambassador in Washington in behalf of Nicholas Tchaikovsky, known as the Father of the Russian revolutionary movement, who had been eleven months in prison awaiting trial. Mr. Tchaikovsky had spent some years in America and endeared himself to men and women in the United States. The petition was granted; Mr. Tchaikovsky was released on bail, and at his later public trial in March, 1910, was acquitted.

They made his work in prison reform a rebellion against the fixed ideas of punishment and custody; they lent the weight of his own death to the humanitarian protest against the fettering of liberty in the North. In the Russian bureaucracy he saw piled up and solidified the spirit of revenge and repression which his life work it was to fight wherever he found it, whether in old and ruthless laws, in blind court practices, or in those medieval modes of imprisonment which persist among us and which wreak an ultimate vengeance upon keeper and prisoner and society alike.

Separated at his death, in life Mr. and Mrs. Barrows were so truly at one, that a review, however brief, of the work of either must have much of the character of a joint biography. Their collaboration on a volume of reminiscences was one of the plans whose fulfillment his death came to prevent. This sharing of life work was the more remarkable because of the great variety of individual experience which came to both. Here was a man who campaigned in the Indian country, and was a peace advocate; who dug up Greek temples and pulled down old jails; who as a linguist mastered the harshest consonants of the nations, and as a sweet singer sang oratorios, and wrote ballads; here was a newspaper correspondent, preacher, editor, stenographer, penologist, parliamentary leader, polyglot poet and philanthropist. In the early days of our westward expansion, there developed a type of frontier minister who traveled great distances to preach in turn to the scattered settlements—an evangelism of the saddle which brought spiritual courage and vision into the material struggle against the wilderness. In much the same way Mr. Barrows served a later generation facing new issues; his circuit was the humanities.

Mr. Barrows was born May 26, 1845, on the lower East Side, New York. He was a child when his father died after a protracted sickness. His mother earned a living for herself and her four children by making shoe-blacking after an old English recipe. At eight years he went as an office boy to the works of his father's cousin, Richard Hoe, the inventor of the first of the modern American printing presses. The boy worked ten hours a day; his wages were a dollar a week; Sundays he listened through three heavy sermons; evenings he went to night classes; and one school year his employer let his wages go on while the boy attended day school. Colonel Hoe was a friend of Morse, the inventor of the telegraph, and the first private wire in the world was strung to his factory. Twelve-year-old Samuel Barrows operated it. The boy also studied shorthand, and throughout his

life was an expert stenographer.* During the war he attempted to enlist in the navy but was thrown out on account of his health; and to retrieve the drains in strength which overwork since childhood had made upon him, he took a position as secretary with Dr. Jackson of the Sanitarium in Dansville, New York. It was there that he met Isabel Hayes Chapin, who was equipping herself as a medical missionary to India, whither she had gone as a bride of eighteen and whence she had returned, a widow, after two short years. Mr. and Mrs. Barrows were married June 28, 1867. They were twenty-two; they had no money; but they were rich in purpose, and with rare courage and mutual helpfulness set about a larger preparation for the work of life.

While Mrs. Barrows completed her medical studies,—those were the days when women students were pelted and ridiculed,—Mr. Barrows served as a reporter on the New York *Tribune*, and for a summer as city editor on the New York *World*, then a religious daily. In 1868 he was appointed stenographic secretary to William H. Seward, who had been Secretary of State in Lincoln's great war cabinet, and he remained in the Department of State until 1874. At one time he fell ill with typhoid and Mrs. Barrows took his post, the first woman employed in the department. During this period, she completed her medical studies by a year at Vienna, specializing in the eye. "You must go," the young husband had said to her, "if I have to live on pea soup and sleep in a loft." As a matter of fact he lodged in a small room and prepared his own food. Returning to America, Mrs. Barrows was the first oculist to practice at the national capital. She taught also in Howard Medical School and took students as boarders. Earnings from these various quarters now enabled the young wife to make it possible for her husband to complete his own professional education. In this way they took turn about, helping each other.

Mr. Barrows had studied out of hours at Columbian University, Washington (exchanging shorthand for Latin and Greek). He now entered Harvard Divinity School and graduated in 1874 (B. D.). Those were the years when Louis Agassiz was delivering

* Mr. and Mrs. Barrows accomplished jointly what had never been done before—the first verbatim report of one of Phillips Brooks's rapid sermons. Mrs. Barrows has listened to addresses in German by Carl Schurz, translated them mentally, and taken them down in English while in process of delivery. For twenty years she was official reporter and editor of the proceedings of the National Conference of Charities and Correction, and has served various international conventions in a similar capacity, inscribing her notes in whatever language was spoken. Post cards marked with pot hooks by husband or wife carried more intelligence to the other than long letters between less gifted correspondents.

his famous lectures in natural science at Cambridge, and every Sunday the New York *Tribune* reported them at a page in length. The work was done by Mr. and Mrs. Barrows, and their reports were made up by Agassiz into a book.

During the summers of 1873 and 1874, the divinity student was with General Custer (perhaps the most famous of our Western Indian fighters), accompanying expeditions to the Yellowstone and to the Black Hills as correspondent for the *Tribune.* These summers were full of adventure. Correspondent Barrows was the first to report the discovery of gold in the Black Hills; on one occasion a bullet struck a tree just above his head, and on another he narrowly escaped an ambush in which his companion was killed. By good fortune he did not set out the next season (that of the Indian massacre when Custer's whole force was ambushed and killed), but with his family spent the year in postgraduate studies at Leipzig. Returning to this country, Mr. Barrows was made minister of the First Parish, Dorchester, Mass. His first sermon bore these words at the head of the first page, in the shorthand characters from which he always preached—"God is love"; and it has been said of him that he never altogether got away from this text. Four years later he became editor of the *Christian Register,* making that Unitarian journal a national force during the decades of the great church weeklies. In 1897, Rev. Mr. Barrows was elected to the Fifty-fifth Congress, a Republican from a heavily Democratic district, which chose him, while he was in Europe, to lead the revolt against a corrupt representative. Congressman Barrows's first success was in securing permission to send ships to India loaded with grain for the famine sufferers; his chief speech perhaps was one in favor of admitting foreign books and works of art free of duty;—again that balance which has been pointed out as characteristic of the compelling interests in his life. His legislative career was short—one term—but during that time he was instrumental in associating the United States Congress with the parliaments of the world. He was the first American to join the Interparliamentary Union, and ten years later was the active member of the committee in charge of the St. Louis meeting which brought here representatives of the legislatures of civilization.

Mr. Barrows's retirement from Washington was followed by the maturing of his larger work for prison reform. He had been one of the founders of the Massachusetts Prison Association and had helped develop the probation system in that state. In 1896 he was appointed by President Cleveland, Commissioner for the United States

on the International Prison Commission. He was a representative of the United States at the quinquennial congresses in Paris and Brussels, and at Budapest was elected president. It was through his efforts that the congress is this year held in Washington. Mr. Barrows was instrumental in securing a federal appropriation of $20,000 for the gathering, and the early work of preparation was done by him. With Mrs. Barrows he had planned a tour of the South American republics to enlist their interest in the Washington gathering. As an outgrowth of the work he was able to carry on through the legations in Washington, Mexico, Venezuela, Colombia, Guatemala, and Panama adhered to the International Congress in the twelve months following his death.

In 1899 Mr. Barrows was appointed corresponding secretary of the Prison Association of New York, and for ten years his influence for progress and breadth of view in penal legislation was cumulative in both state and nation. It was marked by his repeated assaults on the stupid blunder of capital punishment, by his ready recognition of the juvenile court idea, his energetic attacks upon systems of prison idleness, and his unswerving support of the reformatory movement, probation and parole. Mr. Barrows drafted the first probation law of New York state in 1901 and, to quote a recent review by Homer Folks, president of the State Probation Commission, "to his initiative and perseverance we owe its passage." In securing its enactment, Mr. Barrows was obliged to make a number of concessions. "The wisdom of his original position," says Mr. Folks, "has been demonstrated by the actual operations of the statute." Mr. Barrows was a member of the Temporary Probation Commission of 1905–06, which urged further legislation toward a comprehensive state system, and which paved the way for the permanent State Probation Commission, with power of inquiry and suggestion, now serving the commonwealth. These espousals of reform have been linked with a grasp of the technical side of institutional construction and management. Mr. Barrows was a member of the New York State Commission on New Prisons which is charged with the task of replacing old, disease-ridden Sing Sing with a modern plant. To this end he visited Great Britain, Sweden, Finland, Russia, Germany, France, Spain and Portugal. Some of the best energies of the last years of his life were devoted, against domineering political opposition, toward securing the embodiment in the new prison of some of the standards set by modern structures in Europe. At the 1909 session of the New York Legislature, in co-operation with the State Prison Commission,

his association strongly urged the establishment of three state workhouses and a reformatory for youthful misdemeanants. When taken sick, he was in Albany in support of bills to make the office of sheriff of Queens county, New York, a salaried one, to establish a board of trustees of labor colonies for the detention, reformation and instruction of persons convicted of vagrancy, drunkenness, etc., and to establish the "John Howard Industrial School" for the educational, industrial, and moral instruction of juvenile delinquents. In behalf of the latter measure, in a report drafted for the Prison Association of New York, and released for publication one week before his death, he made this appeal:

"The poor boy in New York is pretty well taken care of and so is the youthful felon. But the youthful misdemeanant has been overlooked.

"It is appalling to think that by a process of legal indifference and neglect a boy may be sent for six months or a year to a jail where he comes into the most degraded society, where he is without work and without schooling, except the deplorable schooling in crime furnished by older and hardened offenders. A few figures from the official reports of the State Commission of Prisons show how imperative is the need. The number of boys from sixteen to twenty-one sentenced to jails and penitentiaries for the past year outside of Greater New York was 4428 and the number of the same age sentenced in New York City was 14,044, a total of 18,472. In addition, more than 10;000 between the ages of twenty-one and thirty are likewise sentenced to the jails and penitentiaries."

The passage is cited because of its timely bearing, although it is not representative of the lofty utterances which found place in many of Mr. Barrows's speeches and writings, nor of those less frequent instances in which indignation mounted over his persistent kindliness. Then he spoke the wrath that was in him at the continuation of conditions which sicken and besot humanity. His public arraignment was of methods and institutions rather than of men. He was a staunch fighter of the iniquitous system by which sheriffs derive their income from fees for the custody and keep of prisoners in the county jails. He succeeded in helping abolish it in many counties in New York state, and those who love him best feel that he fell a victim to his unending warfare to this end. For the shrievalty has been one of the prizes in local politics in America and in some states the fee system has had to be rooted out one county at a time. The weeks preceding his illness he was engaged in a determined effort

to free Queens county, one of the strongholds of the system in New York. Hundreds of impressionable first offenders who should have been placed on probation or in the reformatories, had been held in this old Long Island jail because of the profit in their keep. Mr. Barrows's last letter, written from Albany the day he was taken ill, told how men of both parties were leagued against him with an obdurateness which the graft investigations in the New York legislature the past winter have served to throw light upon. For along with that flexibility in American political life which enables us to adopt new forms of penological activities, we suffer the disadvantage even in our older commonwealths that state work is subjected repeatedly to the whims and perversions of the corrupt elements in the legislatures. The movements to build up the state institutional systems and to free them from political interference, involve, therefore, some of the vital working problems in American democracy; and while at an international gathering we may deplore those obstructionists, our fellow-countrymen, who for petty political ends harassed and half-thwarted this man, we can rightly feel that these legislative campaigns in which he sought the public good with singleness of purpose were in no sense petty, but part of the fundamental strivings of popular government toward the nobler social fabric of the morrow. Nor in the immediate issue were his efforts fruitless. Seven days after Mr. Barrows's death, the bill he had worked for passed both houses of the legislature, so that Governor Hughes, who had recommended it, could put his signature upon it and make it law. There was, nevertheless, a solemn indictment in the circumstances of his death, which those who were responsible for blocking the reforms for which he was straining every nerve, must settle with their consciences as best they may,—those who discounted the disease and criminality bred in jail conditions, and saw only an office for the fall elections, and such fees as have made men rich. And there is a challenge in the circumstances of his death to younger men to carry forward the causes that laid such compelling hold upon his last strength.

In his federal capacity, Mr. Barrows did much work with the Department of Justice toward a revision of the penal law of the United States. He was identified with bills before the last Congress, providing for the parole of United States prisoners, for the appointment of probation officers and the suspension of sentence in United States courts, and for a revision of the statutes relating to the commitment of United States prisoners to state reformatories. He was interested in the work of the local commission which reported in

1909 on the jail and workhouse, in the District of Columbia, and which recommended the establishment of a model system for the national capital.

Mr. Barrows's services were not restricted to New York state and the federal government. They were at the call of prison reform in every commonwealth. This was illustrated in his long volunteer work as departmental editor on the treatment of the delinquent for *Charities Review*, *Charities and The Commons* and *The Survey*, involving, as it did, a large investment of time and interest. He was repeatedly chairman of committees of the National Prison Association, and the National Conference of Charities and Correction. Among recent undertakings, mention should be made of his work on the committee which stirred up local interest throughout the country in the sanitary conditions of the county jails. He drafted reformatory and probation laws for the new state of Oklahoma, addressing the legislature in their behalf. His visit and good counsel are among the cherished memories of the leaders in the new state. In 1908 he addressed three state conferences on the Pacific Coast and visited penal institutions from San Diego, California, to Seattle, Washington. In January, 1909, he made three addresses to help arouse public sentiment in Milwaukee, Wisconsin, against conditions in the municipal house of correction.

Through reports which he prepared or edited for the International Prison Commission his work as circuit rider in the humanities found widespread application. There were fifteen of these titles,* and they have been circulated in many countries. In some of these reports he had the assistance of many experts; some were drafted by individual authors, himself among others, and Dr. Charles R.

* *Reports Prepared for the International Prison Commission by Samuel J. Barrows, Commissioner.*

Report of the delegates of the United States to the Fifth International Prison Congress, held at Paris, France, in July, 1895; by Roeliff Brinkerhoff, R. W. McClaughry, Charlton T. Lewis, Paul R. Brown and S. J. Barrows. Washington, 1896.

The criminal insane in the United States and in foreign countries; by S. J. Barrows. Washington, 1898.

The indeterminate sentence and parole law; by Warren F. Spalding, Martin D. Follett, R. W. McClaughry, a committee of the American Bar Association and S. J. Barrows. Washington, 1899.

Penological questions; by S. E. Baldwin, C. E. Felton, J. B. Chapin, M. J. Cassidy, E. C. Putnam, E. G. Evans, James Allison, Michael Heymann, Mrs. L. M. B. Mitchell and Mrs. L. L. Brackett. Washington, 1899.

New legislation concerning crimes, misdemeanors and penalties; compiled by S. J. Barrows. Washington, 1900.

The reformatory system in the United States; by S. J. Barrows, Z. R. Brockway, F. B. Sanborn, C. D. Warner, C. T. Lewis, J. F. Scott, I. J. Wistar, Bishop S. Fallows, Gen. R. Brinkerhoff, Mrs. I. C. Barrows, Mrs. E. C. Johnson, T. E. Ellison, Henry Wolfer, and T. J. Charlton. Washington, 1900.

Henderson, his successor as president of the International Prison Congress.

Mr. Barrows made these reports, together with his biennial trips to Europe, as American prison commissioner responsible to the United States Department of State, a basis for what was in truth a rare diplomatic service—an informal ambassadorship to all nations in the cause of enlightened justice. Witness, for instance, two letters received shortly after his death, in the same day's mail. One, from Tasmania, told how primitive was the prison system there, and what great changes would have to be made before it could truly be reformative. The writer said that the system set forth in the New York Association's report sent by Mr. Barrows would largely form the key to the improvements advocated: "You have given me fresh courage in this, my life work, and strength to carry it on. You little know how far into the future your kindness will reach." The second letter was from an official of the Transvaal Prison Department, who had received counsel from Mr. Barrows, and who had lent his reports in many quarters, "where they would be more eloquent than I," and made them available for the press. The writer added:

"It is clear that American methods find greatest favor here and we trust in the future that we shall be able to keep in touch with the United States and learn what is taking place. When I tell you that since my first letter to you, we have a reformatory in full working order and classification in all the large prisons, and that this session

Prison systems of the United States; by S. J. Barrows, Frank Strong, B. F Smith, C. L. Stonaker, T. D. Wells, H. S. Landis, C. A. Plummer, G. S. Griffith, F. G. Pettigrove, O. M. Barnes, Frank Conley, A. E. Harvey, C. B. Denson, J. D. Lee, I. J. Wistar, Nelson Viall, G. N. Dow, S. A. Hawk, N. D. McDonald, and P. W. Ayres. Washington, 1900.

The cost of crime; by Eugene Smith. Washington, 1901.

Growth of the criminal law of the United States; by D. K. Watson. Washington, 1902.

The Sixth International Prison Congress, held at Brussels, Belgium, in August, 1900. Washington, 1903.

Penal Codes of France, Germany, Belgium, and Japan; by R. Bérenger, E. Jarno, Alfred Le Poittevin, Wolfgang Mittermaier, Hermann Adami, Adolph Prins, and Keigo Kiyoura. Washington, 1901.

Modern prison systems; by C. R. Henderson. Washington, 1903.

Programme of questions for the Seventh International Prison Congress. Washington, 1904.

Tuberculosis in Penal Institutions; by Julius B. Ransom, M.D. Washington, 1904.

Children's courts in the United States; by S. J. Barrows, R. S. Tuthill, T. D. Hurley, Thomas Murphy, J. M. Mayer, R. J. Wilkin, B. B. Lindsey, Mrs. H. K. Schoff, Bert Hall, A. F. Skinner, G. W. Stubbs, Mrs. H. W. Rogers, and C. C. Eliot. Washington, 1904.

Report of proceedings of the Seventh International Prison Congress, held at Budapest, Hungary, in September, 1905. Washington, 1907.

of Parliament will see introduced the principles of indeterminate sentence, parole and probation and other improvements in the treatment of juvenile delinquents, you will see that your action in sending me your books was not entirely in vain."

The meeting of the International Prison Commission in Paris in the July following Mr. Barrows's death, was made the occasion of expressions of regard on the part of fellow members. Doctor Guillaume of Switzerland, the secretary, reviewed Mr. Barrows's work from the time of his attendance at the Paris Congress in 1895. The Congress was founded through the efforts of an American, Dr. E. C. Wines, but the United States had never taken the steps necessary to formally become a party to the international body. This followed in 1896, and Mr. Barrows was appointed American Commissioner. From that date forward, he sought in the reports, in the regular sessions of the international commission, and in the quinquennial congresses to act as interpreter of the vital advances in penology which were being carried forward in America. Through his efforts, more than through any other agency, have European students and commissions become acquainted with the work of the American reformatories, the juvenile courts, the junior republics, the indeterminate sentence, probation and parole as practiced in the more progressive states. It is perhaps difficult for Americans to appreciate the eager welcome accorded these discriminating official reports on the contributions which the new world has been making to the practice of social control and regeneration. In Mr. Barrows, they found a spokesman who was afire with the fresh inspiration which comes of a new continent where civilization is less trammeled with precedent, but who, nevertheless, was in no sense a provincial; whose alert interest and foreign tours of inspection made it possible for him to relate what he put forth to the laws and institutions of the mother countries. From them, in this humanitarian balance of trade, he drew as well as gave. At the Brussels Congress of 1900, Mr. Barrows presented reports on the indeterminate sentence and conditional release. "There it was," said Dr. Guillaume, "that he won all our hearts." M. Maus, chief of the Bureau of Justice for Belgium, in reporting the section on penal legislation, quoted especially his saying that it would be no more absurd to let a patient, whether well or not, leave a hospital on a fixed day, than to let the release of a prisoner be entirely a matter of the calendar. "We do not ask you to abandon what you have already created in Europe," said the American Commissioner, "but to adopt what you find true in our experience." He showed how

Americans have taken the good wherever we have found it—such inspiration as has come to us, for instance, from the Irish prison system, or the reform schools of continental Europe. The report on American reformatories which he transmitted to another section of this Congress, led to a request for still further documents "so as to build on this sure foundation," and his report on children's courts to the following Congress at Budapest was characterized as "popularizing this new institution in all civilized countries." At Budapest also he gave a public lecture on child-welfare work in the United States and was charged with the presidency of one of the sections in which the discussion ranged in three languages. He communicated the official letter of invitation from President Roosevelt for the Congress to come to America and his election to the presidency was by acclamation. Two years later at Lausanne, he reported to the International Commission on the progress of the work, and again to quote Dr. Guillaume "we saw for ourselves with what devotion he fulfilled his duties."

Space forbids excursions into the other fields of interest which Mr. Barrows explored with such keen zest throughout his life. His religious experience began with folded arms beneath the teacher's quick rattan in the old Cannon Street Church, New York, as related in his book, A Baptist Meeting-House. As a stripling, he was known as the "Boy Preacher," frequenting the docks and climbing on barrels or the first keg at hand, to beg the sailors to enter the good road. He picked up words of greeting from strange tongues, and kept track of the cruisings of the ships making port. Soon after his majority he became a Unitarian, and what a friend has called his "incessant helpfulness" was but a practical living out of the catholicity of his faith. Margaret Deland drew not a little of the material for her novel, John Ward, Preacher, from his early book, The Doom of the Majority of Mankind, and one of his recent articles, The Church I Am Looking For, published anonymously in *The Independent*, provoked much discussion. The writer had looked for a vineyard in which to work; instead they had set him to building fences. He was a strong advocate in the peace movement, a leader in the Mohonk conferences on the Negroes, Indians, and international arbitration, and in each of these fields took a lifelong and active interest. It was Howard University (colored) which granted him the degree of doctor of divinity in 1897. Owing to his interest in legal questions he became an active member of the American Society of International Law.

Mr. Barrows was a frequent editorial contributor to magazines, notably *The Atlantic, The North American Review, The Outlook* and *The Independent,* his writings showing both a constructive earnestness and an inimitable humor. In 1908 he prepared a series of articles for *The Outlook* on the temperance movement and became a formidable figure in the new discussion of the liquor question. His readiness to assume emergent tasks in addition to his serene mastery of routine responsibilities was illustrated in the spring of 1906, when he acted as executive secretary of the Russian Famine Relief Committee, which collected over $50,000 in this country. He was one of the first to listen and act when Nicalos Shishkoff came single-handed to this country and made his urgent appeal for the Volga provinces; and the following summer (1907) Mr. and Mrs. Barrows travelled seven days and nights, going and coming, from Moscow, to spend one day with him at Samara. No trouble was too great for him to take for a friend.

The following paragraphs are from a resolution adopted May 1, 1909, by the Ministerial Union of Boston, Massachusetts, where for twenty-five years Mr. Barrows was a resident; four years as we have seen as minister of the First Parish, Dorchester; sixteen as editor of the Christian Register and afterward as member of Congress from the Tenth District:

"Many of us knew him personally, and to the respect and admiration which all felt, added our warm friendship and love. . . . We knew him as one of the best of men, large-hearted, unselfish, loving and lovable. . . . He served with untiring zeal every cause involving the welfare of humanity,—political emancipation at home or abroad, equal suffrage for men and women, the temperance movement, the industrial emancipation of women and children, a wiser and more liberal philanthropy, the humane treatment and reformation of prisoners, and care for them when discharged,—in every way manifesting his belief in a brotherhood of universal goodwill and peace. A master of languages, acquainted with many lands by frequent visits, an international messenger of mercy and peace, he was a true 'citizen of the world.'

"Nor can we forget his delight in music, poetry, and art, his love of nature, his keen sense of humor, his happy, youthful spirit, his courtesy, sympathy, and loyalty, which made him dear to young and old. Shall we not believe that he has left us but to continue his progress, 'onward and upward forever?'"

A hundred stories could be told of the approachableness and

ineffable sympathy of the man. "You need not be afraid to disturb me by writing upon this subject," was his answer to a letter from an unknown questioner,—"I am always deeply interested in having something done." He often told how he taught a new play at jackstones to the newsboys at the corner where he took the car. Passing by, some days later, he saw one of them nudge a playfellow: "There he goes," he overheard, "there's the feller that interduced 'skunks' inter Dorchester." But neither his ever-present sympathy, nor his patient reluctance to retort in the face of opposition or attack, nor the glamour of philosophy which shone in his face, was cloak for inaction. He was the fastest horseman in the Massachusetts regiment of which for fifteen years he was chaplain. As a youth, in the days of the draft riots, he stamped out the firebrands which a mob had thrown into a store they were about to loot. As a reporter, he made some of the famous "beats" of his day—one, a great wreck on the Atlantic Coast, and another, a New Jersey execution. The hanging was delayed until a late hour and, when the correspondents posted to the telegraph office, they found it closed. Barrows connected the wire which had been cut off and sent his message in with his own hands—the only one to reach New York in time for press.

A member of the Handel and Haydn Society in Boston, Mr. Barrows became a member and director of the Oratorio Society in New York. He learned the piano at fifty, and at the time of his death was practicing two hours a day on the organ at St. George's. He composed the words and music of many hymns, the harmony of an organ prelude, the lively music of such fancies as The Echo Queen, and The Beacon Street Tramp, a "Panethnicphilanthropometric Play" which he wrote and took part in with much gaiety.

Mr. Barrows spoke French, German and Modern Greek, read Dutch and Italian and was learning Spanish for his South American trip. The address of the American Commissioner in Hungarian was a feature of the great Budapest Prison Congress. This last incident illustrates the painstaking thoroughness with which Mr. Barrows put himself into an undertaking which would make for common understanding among men. In the months preceding the Congress he studied the Hungarian grammar and vocabulary, in order to enable him to take some part in informal conversation. He wrote out his speech in English, and not wishing to trust it to an ordinary translator, unfamiliar with penology, he translated it into German for a German friend, who in turn translated it into Hungarian. He then practically committed it to memory, and after reaching Austria-Hungary, was drilled

in it by a Hungarian professor, much as you would practice a song. When he delivered it, all this exacting work of preparation was forgotten. He began in French, then changed to Hungarian and voiced his admiration for the Magyar people. What he told them was not the customary platitudes, but how, as a child in New York, he had been lifted to the shoulder in a crowd that he might see Kossuth. Not a man in that room of Hungarians had ever seen the great exile. At Mr. Barrows's words they jumped to the tables and applauded vociferously. The national feeling in 1905 in Budapest was so intense that at this banquet the musicians did not dare play the national hymn; and in introducing the story, Mr. Barrows explained that he gave it only as an historical incident. The next morning, every newspaper in Hungary had his address in full; and the words of fraternal liking of the American Commissioner, unknown the day before, were repeated throughout the empire.

Mr. Barrows was not only a polyglot, but a distinguished student of the dead languages of the East. In the *Unitarian Review* of Boston, of which from 1877 to 1888 he was associate editor, he published many essays on Assyriology and the Bible, the Comparative Mythology of Ancient Peoples, and the like.

It was the life and culture of the Greeks which laid closest hold upon his hours of leisure and which had artistic sequence in the work of his daughter, Mabel Hay Barrows Mussey, in reviving the Greek drama in America. Mr. Barrows spent a year in Greece with Dörpfeld, the famous German archæologist, and was with him when he dug up the Homeric city of Troy. He was the author of The Isles and Shrines of Greece. Dr. Henderson, his successor as president of the International Prison Commission, said of him at the Paris meeting in 1909: "By the side of the old songs of Homer, which he loved, he sought to place the sweet melodies of hope for the convicted." Homer was, in truth, his heart's companion, and at his summer home on Lake Memphremagog in lower Quebec, the first two hours after sunrise were given over to reading the new meaning of a student of peoples into the ancient lines. It was in this camp started by the Shaybacks,—as the Barrows had called themselves when they first explored the region thirty-three years before,—at Cedar Lodge, and Cabin June, and Birchbay, that the marvellous family life of this American household found its amplest expression. Hoe, Seward, Agassiz, Phillips Brooks, Brockway, Dörpfeld, Custer,—those were various men to mark a man's life intimately, and they but stand for a hundred other men whom he

counted as friends, whose names would be equally familiar to an international congress. But here—and this is of greater meaning—about their open fires and under the log rafters, "Uncle June" and "Aunt Isabel" have been in a very real sense foster parents to a company of children of the world, knowing no race, or creed, or color as not of kin. Here was an everyday embodiment of that universal sympathy, gentle, resistless, which marked Mr. Barrows's play, and work, and preaching—which made fraternalism the great tenet of his democracy and made the uncrowned decent living of this man at once a harmony and a social force. Here was a man who held fellowship with the ancient Greeks, with the famine-lean peasants of the Volga provinces, with the prisoner of the meanest jail, with the masters of music and art and government, with the God of the mountain peaks of his northern lake,—"Nor time nor space nor deep nor high" could keep his own away from him.

VI

GEN. RUTHERFORD B. HAYES*

By W. M. F. ROUND

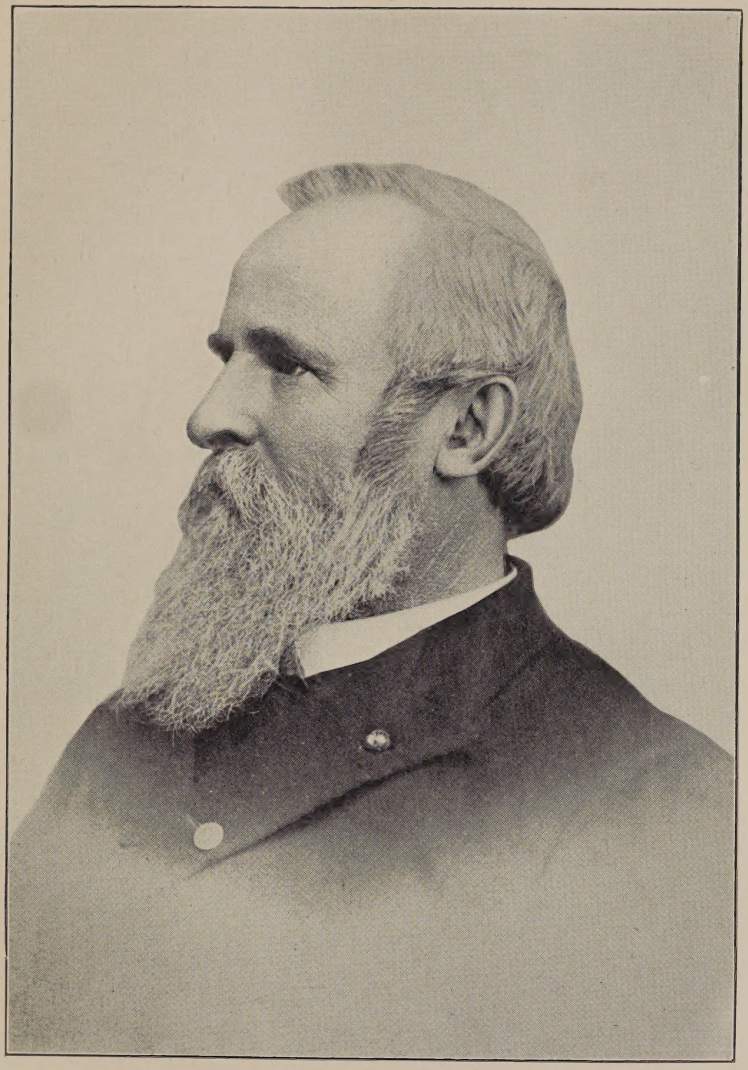
EX-PRESIDENT Rutherford B. Hayes, twice a congressman, thrice governor of Ohio, once a military officer of high position and renown, once President of the United States, had also another side to his character than that indicated by these honorable titles. He was eminently and before all things a philanthropist, a lover of his fellow men and a worker for their interests.

A careful study of his life from early manhood until his too early death shows him to have been identified with many of the great reforms of his time. Quietly, unostentatiously, valuing his great honors for what they were worth, but never parading them, Mr. Hayes was easily a leader in the movement for the uplifting of the colored race in the South and for the improvement of the penal system of the country.

There was no subject touching the elevation of humanity in America, no matter how deep the problem involved, but that General Hayes brought the most untiring efforts to help in its solution and gave both his time and his name to the organization of practical charities. Beginning in his own city among his own neighbors, he was known as a generous giver, a thoughtful adviser, a sympathetic helper, wherever there was need.

In the larger affairs of the national organization of charities this good man permitted himself to be loaded with onerous duties, never once counted his ease or the leisure which he had the right to enjoy, and did perhaps more than any other man in the country to give stability and character to the Prison Reform movement, to the cause of the education of the colored man, and to a reasonable amelioration of the woes of the Indian. Calm, painstaking, with a singularly clear vision for the main facts and issues, never wavering in the slightest where a question of principle was involved, General Hayes was a tower of strength to any movement to which he lent his name,

* From the Proceedings of the Annual Congress of the National Prison Association of the United States, held at Baltimore, December 3–7, 1892, page 266.



R. B. Hayes.

and knowing the prestige that belonged to an ex-President of the United States, he lent his name only where he was willing to follow with his entire influence and his whole personality. There was no clearer headed or more conscientious public man in this country than he was. His patience in bearing the atrocious calumnies of an opposing party was heroic.

It is as a prison reformer that the writer of this article has best known General Hayes and his work. In 1870, there was called at Cincinnati a National Prison Congress—which perhaps had a wider influence than any that has been held since—and we find General Hayes presiding at the congress. At that time he was governor of Ohio. All the surviving members of that congress bear testimony to the heartiness with which Governor Hayes entered into the deliberations, and from that moment he linked himself with the advanced guard of prison reformers. He has never fallen behind.

At that time the indeterminate sentence was only named to be considered a scheme of visionaries and was regarded as an attack upon established theories of punishment for crime. Governor Hayes at once recognized in it the keynote of the new penology and the solution of many of the most vexed problems of crime treatment. He, however, with singular wisdom refrained from making it the burden of his public utterances, but lost no opportunity to aid the scheme and its gradual introduction into his own and other states. He engaged in every movement of the prison reformers, and was one of the original incorporators of the National Prison Association of the United States.

Upon the death of Dr. Wines the National Prison Association of the United States, having accomplished a large work in the organization of the International Penitentiary Commission and the establishment of international penitentiary congresses, became inactive. The work inaugurated by it in Europe went on most successfully, but the National Prison Association itself held no meetings. In 1883, it was found desirable to reorganize the National Prison Association. A call was issued by the Prison Association of New York for a meeting to be held at Saratoga at the same time as the meeting of the National Social Science Association. Four men of the original members of the association responded to the call. To make a quorum required five, and the writer of these lines went out to search for the fifth, finding the late Irenæus Prime in a Saratoga boarding house just recovering from a severe illness, who at a great risk to his health left his room to complete the quorum. Then and there General

Hayes was elected president of the National Prison Association. There was great uncertainty as to the success of its reorganization, but in the minds of those who had the matter in hand there was no doubt as to its need. A full statement of the cause was written to General Hayes, who at once accepted the position of president of the association, and from that moment he has held a laboring oar in the organization and upbuilding of this great body, which is perhaps to-day as influential as any similar organization in the country or in the world. The journey from Fremont to New York was never too long for him to take to attend the meetings.

A man full of cares and occupations, he always found time for a careful and thoughtful consideration of every question that came before the association. He has never missed a meeting of the National Prison Congress, and his speeches from the first have had the truest ring of the reformer. In his Toronto address we find him denouncing the jail system of the country and proposing measures for its reformation. We find him demanding the entire separation of young and old offenders. We find him advocating the permanent confinement of habitual criminals in his Boston address. We find him pleading for a recognition of the common humanity in criminals alike with honest men. In Nashville we find him making an earnest plea for the indeterminate sentence. In Cincinnati we find him pleading for a better education of criminals in prison industry and in letters; always in the front rank and always following up his words by his utmost personal influence in his own state and in the nation.

Under the presidency of General Hayes the National Prison Association in its organization and re-organization has grown from its five members in Saratoga in 1883 to more than two hundred, and numbers all the leading prison men of the country. There is not one of them but has felt a warm feeling of fellowship and love for President Hayes; that they could freely approach him for advice, and fully depend upon him for support in any measure of reform that they wished to introduce.

It is not alone in the field of prison reform that General Hayes has won distinction as a philanthropist. His presidency of the board of managers of the Slater fund has led him to a most thorough study of the social condition of the Negro at the South, and of methods for his uplifting. The writer of this article can remember a conversation with General Gordon, of Georgia, in which he said that he had never seen in his life a man who had so thoroughly mastered the difficulties that beset the problem of the colored race in the South as General

Hayes. In the war he had taken his life in his hand to fight for this race, had thrown all the weight of his character against slavery; as a President he had undertaken the problem of reconciliation between North and South, fully recognizing the rights of both the vanquished and the victorious; and later on, as a citizen, had studied the whole problem of the Southern social condition without prejudice or sectional bias. His faith in the future of the colored man of the South was very great, but his uplifting was to depend upon his education, and his education to be effected and controlled by the race that had been his master. It must be a process of generations. In the administration of the Peabody and Slater funds he was a tower of strength and of wise counsel.

In all matters of education General Hayes was deeply interested. As a trustee of the Ohio University he advocated the most advanced methods, the most liberal scheme of education. As a private citizen in Fremont, there was not a detail of public school management that he was not familiar with, and there was not an educational movement in the whole country based upon novel or advanced ideas that he did not find it worth while to study, and if possible, to approve.

When the scheme for the Burnham Industrial Farm was laid out, sitting face to face with General Hayes in an hour's conversation the organizer unfolded to him the principles that were to underlie that institution. The need had already been apparent to both. Intelligent questions as to the smallest details of the plan, wise criticisms of some features, warnings as to some dangers, all fell from the lips of this great-hearted public man, and at the conclusion of the conversation he put forth his hand and said, "You are on the right track; never be discouraged. You will certainly succeed." He was from that hour a warm friend of the movement. Among the most cherished traditions of the Burnham Farm is the memory of a visit of several days' duration, and hanging on the wall of the Brothers' Room is a cordial letter expressing approbation of the system. During that visit there was not a boy there with whom Mr. Hayes did not have a personal talk as to his future nor a brother with whom he did not leave a new impulse of zeal by his inspiring words. He followed the growth of the movement step by step and had planned another visit during the coming summer.

In his charities, in his works of public philanthropy, in his efforts for education, he was most generously unsparing of himself and most conscientious. He never permitted his name to be used

in connection with any enterprise until he had sifted it to the utmost. He never permitted his name to be used in connection with any enterprise to which he did not give his own personality. If he accepted a title, he accepted the duties that went with it, and performed them in the most careful and methodical manner. His opportunities for enriching himself by the use of the prestige that naturally attached to him were very great. He put them by with admirable firmness, and the dignity that belonged to a man who had held the first office in the gift of the nation was never lowered by any act of his daily life. Those who knew him best, most closely, the citizens of his own town, bear testimony to the simplicity of his character, to the tenderness of his heart, to the generosity of his nature, to the wisdom of his counsel.

He will be remembered in the pages of our national history as a brave soldier, a noble man, a good President and one of the foremost of American philanthropists, who carried the duties of the first citizen of the country with entire integrity. Because he lived and labored he has left a higher standard of American manhood.

[The revival of the American Prison Association after the death of Dr. E. C. Wines was chiefly due to the initiative of Mr. Round. He, more than any other individual, was responsible for the enlistment of President Hayes in the movement, and his unpaid and valuable service as Secretary of the Association deserves the grateful praise of all who are interested in its work and success.—EDITOR.]

VII

BIOGRAPHICAL SKETCHES

Francis Lieber

DR. FRANCIS LIEBER, to whom reference has been repeatedly made in the preceding pages, is entitled to more than the bare mention of his name. He deserves, indeed, an article to himself.

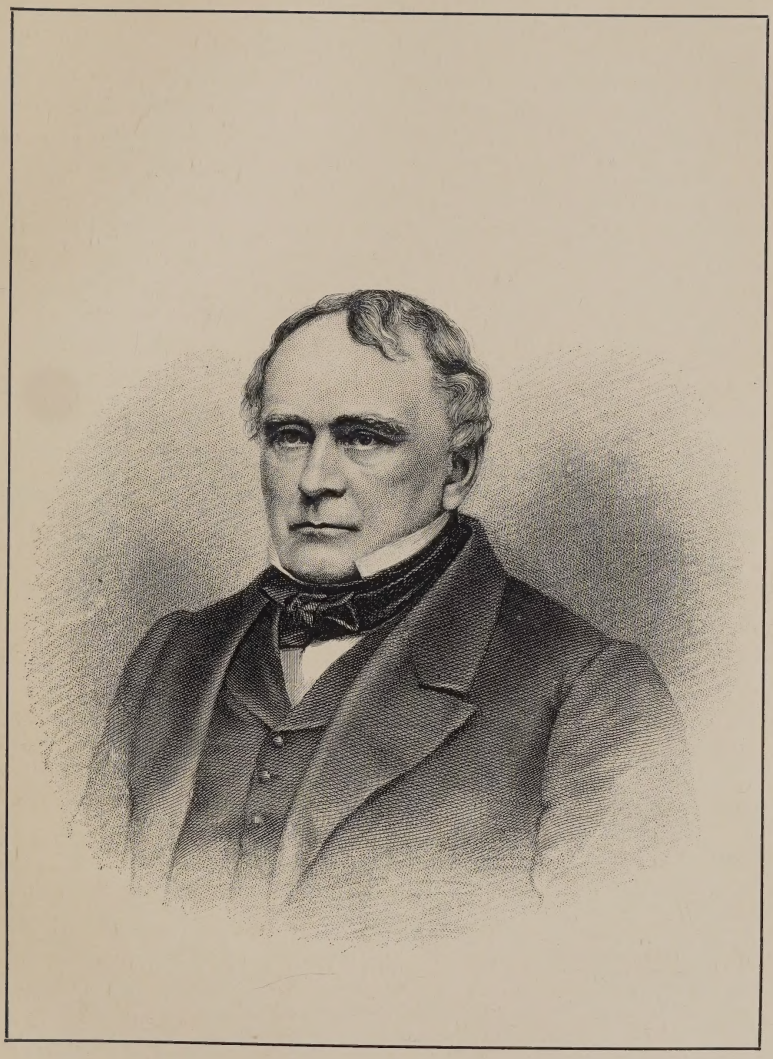
He was born in Berlin, in 1800; saw the French troops enter the Prussian capital, after the battle of Jena; swore upon his knees, in 1813, to assassinate Napoleon; enlisted in the Prussian army at the age of fifteen, under Blücher; and fought in the battle of Waterloo, receiving two wounds at Namur, one of which was through the neck and came near proving fatal. He was an early member of the German Turn-Verein, and in 1819, for little or no apparent reason, was for four months a political prisoner. He was again imprisoned in 1824 at Kopenick, a suburb of Berlin, and was released (but upon conditions) at the expiration of more than seven months, only at the personal intercession of Niebuhr, the historian, in whose family he had been a tutor when Niebuhr was Prussian Minister at Rome. Young Lieber had, in 1821, while a student at Dresden, been deeply smitten with philhellenism, and in 1822 he sailed, with a company of juvenile enthusiasts in the cause of human freedom, for Greece. He returned from this expedition penniless and disillusioned, having lost all and achieved nothing. As Col. Napier said of those who shared his aspirations, "All came expecting to find the Peloponnesus filled with Plutarch's men, and all returned thinking the inhabitants of Newgate more moral." It was then that Niebuhr took him to his own home, and healed his more than half-broken heart. He was finally pardoned by Frederick William IV, in 1824.

In 1826 he became a voluntary exile from his native land, spent nearly a year in England, and finally landed in New York in June, 1827. He proceeded directly to Boston, where he established a gymnasium and swimming school. He became the editor of the Encyclopedia Americana, published by Carey, Lee and Carey in Philadelphia, of which the first two volumes were printed in 1829. In September and October, 1833, he drew up the plan adopted for the organization

and government of Girard College. In 1835, he was elected professor of history and political economy in the university of South Carolina, a position which he held for twenty years, and then resigned. In 1857, he was chosen professor of history and political science in Columbia College, New York. Dr. Lieber's favorite aphorism was "*Nullum jus sine officio, nullum officium sine jure.*" In his inaugural at Columbia College, in 1859, he said that right and duty are like Castor and Pollux or St. Elmo's fire, an electrical phenomenon sometimes witnessed at sea, in which a blue flame appears at one or both ends of a yard-arm. The appearance of two flames presages a fine sailing; if only one is seen, it is a sign of foul weather. In his house he gave a conspicuous place to the inscription, "Patria cara: carior libertas: veritas carissima." His biographer, Mr. Thomas S. Perry, declares that his life was moulded by that thought.

There are in his Life and Letters many indications of his interest in the prison question. He visited the Eastern Penitentiary of Pennsylvania in October, 1831, of which he writes in his diary: "The best prison in existence, according to de Tocqueville and de Beaumont. I shall make myself well acquainted with this subject, for I feel sure it will be one of the greatest interest to me, inasmuch as right and wrong have always occupied my mind." In May, 1832, we find him at Sing Sing, where he met Mr. Crawford, the English Commissioner to inspect and report upon American prisons. In 1834, he mentions in his diary, among the subjects continually in his head, that of "penology." He coined this word from his brain; later he defined it in a letter to de Tocqueville, as "that branch of criminal science which occupies itself (or ought to do so) with the punishment and the criminal; not with the definition of crime, the subject of accountability and the proving of the crime, which belong to criminal law and the penal process." In a letter to Privy Councillor Mittermaier, in 1836, he wrote: "Do not feel that I shall give up writing my 'Penology.' It is one of the thoughts which have taken possession of my mind, and it will occupy me until I have mastered it. I hope to show that it is the duty of the state to reform the criminal; at all events it must be her aim not to make him any worse."

This thought was in his mind, evidently, when in 1844, in conversation with Frederick William IV, King of Prussia, praising and defending the Pennsylvania system of prison discipline, he said: "When you bring together six criminals who have each six degrees of evil in them, you will increase this to twelve by bringing them in communication with each other." Under the seal of the strictest



Francis Lieber

secrecy, he wrote de Tocqueville: "The king is unconditionally for the Pennsylvania system, but most of his Ministers are not." Humboldt, among others, opposed it. At this interview, Lieber implored the king to "put an end to the scandalous public executions." These he called "extramural;" the words extramural and intramural, which are now a part of the English vocabulary, were both his invention. He was nevertheless a firm believer in the necessity for capital punishment, and ridiculed the arguments adduced in opposition to it. The king desired to appoint him Inspector General of Prussian Prisons, and lecturer on penology to the universities, but Lieber declined this offer.

In 1848, he was appointed by the meeting of the "Friends of Prison Discipline" chairman of a committee on the pardoning power and its abuses. He wrote a paper dealing with this question, which was read at their meeting in Philadelphia the following year, and incorporated in the annual report of the New York Prison Association.

How far he was from accepting the basis of the new criminology, or at least from adopting its conclusions, may be inferred from his definition of punishment as "the intentional infliction of some sufferance as deserved sufferance, in which it differs from the infliction of pain by the surgeon." (Civil Liberty, p. 462.) Also, from the following observations on the subject of pardon: "The reported reformation of the criminal must in no case form the sole ground for pardoning. This is acknowledged, I believe, by almost all penologists of note and practical knowledge; and, where it has been tried to hold out an abridgment of the punishment as a reward for good behavior, the consequences have been bad. The hope of pardon for good behavior, which of course can never be absolutely known, leads to hypocrisy, and prevents the very reformation sought for, because it does not allow the prisoner to enter into that state of calm resignation which, according to all experience in criminal psychology, is an indispensable requisite for reformation."

Admitting the correctness of his understanding of the word punishment, reformatory treatment of a criminal undergoing the penalty of his crime is surely something quite different. We must also sharply discriminate between pardon, or executive clemency, and an abridgment of his term of incarceration promised to the convict in the criminal code, in case he complies with certain prescribed conditions. He earns his release under the commutation laws, by "good behavior," or by good conduct coupled with industry; but under the indeterminate sentence, this is not true. He must prove

that imprisonment and the training given him while in prison have effected such a change in his attitude to society that he may now be safely set at large; and the evidence is threefold. It includes diligence in the culture of his native intelligence, as well as in labor, and obedience to the rules under which he lives. More than that; his release must not so shock the moral sense of society as to negative whatever deterrent influence may attach to the spectacle of his merited suffering by reason of deprivation of his personal liberty.

Dr. Lieber's view of the relations between criminal justice and a person accused of crime is expressed in a paragraph on the characteristics of "a fair and sound penal trial," in Civil Liberty and Self-Government (Chapter VII), as follows: "The person to be tried must be present (and of course living). No intimidation before the trial, or attempts by artifice to induce the prisoner to confess; a contrivance which protects the citizen even against being placed too easily in a state of accusation. The fullest possible realization of the principle that every man is held innocent until proved otherwise, and bail. A total discarding of the principle that the more heinous the imputed crime is, the less ought to be the protection of the prisoner; but, on the contrary, the adoption of the reverse. A distinct indictment, and the acquaintance of the prisoner with it sufficiently long before the trial to give him time for preparing the defence. That no one be held to incriminate himself. The accusatory process, with jury and publicity; therefore an oral trial, and not a process in writing. Counsel or defenders for the prisoner. A distinct theory or law of evidence, and no hearsay testimony. A verdict upon evidence alone and pronouncing guilty or not guilty. A punishment in proportion to the offence and in accord with common sense and justice; especially no punitory imprisonment of a sort that necessarily must make the prisoner worse than when he fell into the hands of the government, nor cautionary imprisonment before trial, which by contamination must advance the prisoner in his criminality. That the punishment must adapt itself to the crime and criminality of the offender; that nothing but what the law demands or allows be inflicted; and that all that the law demands be inflicted. No arbitrary, injudicious pardoning, which is a direct interference with the true government of law." Although, in this passage, he advocates "a punishment in proportion to the offence," nevertheless, in his Manual of Political Ethics (Book IV, Chapter III) he denies that punishments are equivalent to offences, "as the fines for most crimes were called in the early penal tariffs so peculiar to the Teutonic

tribes. Punishment is by no means intended as a moral or social atonement for the offence;" and he remarks, "All who are acquainted with the moral treatment of criminals know well that this supposition, that the moral account is balanced by the suffering of penalty, as debt and credit are in money matters, is one of the most common obstacles to finding entrance into an obdurate heart."

He was clear in his rejection of inquisitorial, as opposed to accusatorial, criminal procedure. "Perhaps there are no points so important in the penal trial in a free country, as the principle that no one shall be held to incriminate himself, that the indictment as well as the verdict must be definite and clear, and that no hearsay evidence be admitted. . . . In the inquisitorial process, the process depends upon the questioning of the prisoner. An accused man cannot feel that perfect equanimity of mind which alone might secure his answers against suspicion. . . . The government prosecutes; then let it prove what it charges. So soon as this principle is discarded, we fall into the dire error of throwing the burden of proving innocence wholly or partially on the prisoner. . . . A fair trial for freemen requires that the preparatory steps for the trial be as little vexatious as possible. They must also acknowledge the principle of non-incrimination. This is disregarded on the whole of the European continent. The free range of police power, the mean tricks resorted to by the 'instructing' judge or other officer, before the trial, in order to bring the prisoner to confession, are almost inconceivable, and they are the worse because applied before the trial, when the prisoner is not surrounded by those protections which the trial itself grants."

These observations have a distinct bearing upon the unwarranted and illegal use made by police officials in the United States, of "the question," as practiced under medieval canon law by the Roman Inquisition in order to extort from the accused a confession of his personal guilt and also the denunciation of his accomplices or other suspected persons. Torture was associated with the question. In what is called "the sweat-box," where the police apply to the arrested suspect what is known as "the third degree," there is too much reason to believe that torture in various forms, mental and physical, is still practiced, though all civilized nations have agreed to abolish it.

A voluminous author, two of Dr. Lieber's books may here be especially mentioned: He was the American translator of de Beaumont and de Tocqueville's great work on The Penitentiary System in the United States (Philadelphia, 1833), to which he prefixed an

introduction and appended valuable notes. The Pennsylvania Prison Discipline Society published (1838) his Essay on Penal Law and Solitary Confinement at Labor. The same society also printed his Letter on the Relation between Education and Crime. The legislature of New York published an article from his pen on The Abuse of the Pardoning Power. The legislature of South Carolina published a letter of his on The Penitentiary System.

Among his friends he numbered some of the most illustrious men of the old and the new worlds. In Europe: Niebuhr, Ranke, Bunsen, de Tocqueville, von Holtzendorff, Mittermaier, Bluntschli, Alexander von Humboldt, and others. In America: Kent, Story, and Greenleaf; Calhoun, Clay, Webster, Choate, and Sumner; Audubon, Agassiz, Henry, Bancroft, Longfellow, Hilliard, Everett, Howe, and many more of like social, political, scientific, and literary standing.

Dr. Theodore W. Dwight

Concerning Dr. Theodore W. Dwight, not so much of general interest can be written. He was not, like Lieber, a great writer of books; and he did not lead so adventurous and varied a life. Born at Catskill, New York, in 1822, he was a grandson of the first Timothy Dwight, and first cousin to the second Timothy Dwight, both presidents of Yale College. He was graduated, at the early age of eighteen years, from Hamilton College, in which he was first a tutor and afterward professor of law, history, civil polity and political economy. In 1858, he left Hamilton, to become professor of municipal law in Columbia College, in the city of New York. Later, he was made dean of the new Columbia Law School. He retired from the latter position in 1891, one year before his death. In the thirty-three years during which he followed the vocation of a teacher, ten thousand students passed under his instruction.

Besides holding the presidency of the New York Prison Association, he was, at different periods of his life, a member of the constitutional convention of 1867, of the state commission of appeals (1874–75), of the commission to establish the Elmira state reformatory, of the board of state charities, and of the State Charities Aid Association. He represented the state of New York at the International Prison Congress of Stockholm, in 1878. He was the first president of the Dante Society of New York, first president of the University Club, etc.

Dr. Dwight was for a time associate editor of the *American Law*

Register. He was also editor of Johnson's Cyclopedia, and of the American edition of Maine's Ancient Law.

Edward Livingston

Edward Livingston, whom Sir H. S. Maine, the author of Ancient Law, characterizes as "the first legal genius of modern times," was an American citizen of unquestionably eminent Scottish lineage, having been a direct descendant in the male line, from Sir Alexander Livingstone, one of the two joint regents of the kingdom during the minority of James the Second, who was Keeper of the King's Person. The New York branch of the Livingston family is derived from a younger son of Alexander, the fifth Lord Livingstone, who was one of the guardians of Mary Queen of Scots, and whose daughter Mary Livingstone, was one of the four Maries, maids of honor to the queen. Robert Livingston, the second of the name to emigrate to the New World (the first, who was a brother of the first Earl of Linlithgow, having been Baron of Nova Scotia), settled at Albany, where he obtained, by purchase from the Indians, an estate of 160,000 acres, with a frontage of twelve miles upon the Hudson River. This estate was erected into the Lordship and Manor of Livingston, and the patent confirmed, in 1715, by George the First. Edward Livingston was a great-grandson of Robert, the first Lord of the Manor, and first cousin once removed to Robert, its third and last proprietor, who divided it fairly among his surviving children.

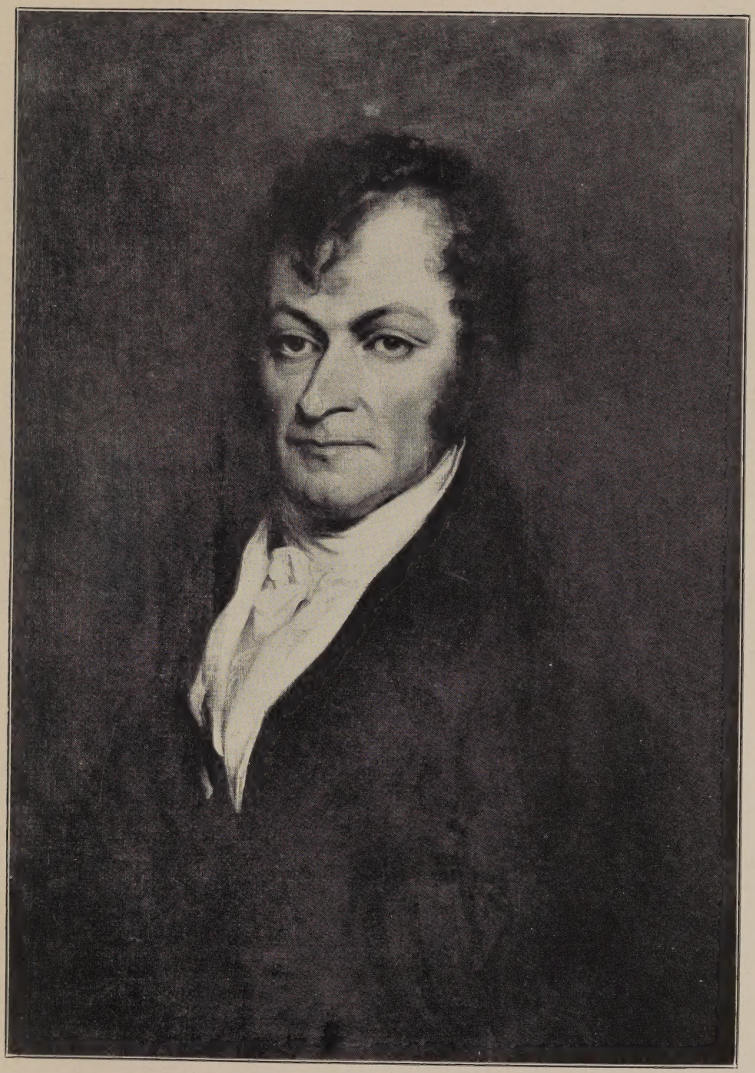
Edward Livingston was the youngest of eleven children of Robert R. Livingston, one of the judges of the Supreme Court in the colony of New York. Ten of the eleven lived to old age, ranging from sixty-six to ninety-eight years. Edward was born at Clermont, May, 1764, and was therefore twelve years old at the date of signature of the American Declaration of Independence which was framed by a committee of five, of whom Chancellor Livingston, Edward's older brother, was a member, and among the signers will be found the name of Philip Livingston, cousin to the supreme judge who was Edward's father.

Graduated from Princeton College in 1781, at the early age of seventeen years, he at once entered upon the study of the law, first at Albany, and later in the city of New York, where he was admitted to the bar in 1785. Among his fellow-students he numbered James Kent, Alexander Hamilton, and Aaron Burr. In 1794, he was elected as a Representative in Congress from New York, and remained a member of the House for six years, where he opposed the

passage of the alien and sedition laws, and cast his vote for Jefferson as President of the United States. To show the strong bent of his mind and heart, it may be mentioned that during his first term at Washington he moved the appointment of a committee "to inquire and report whether any and what alterations should be made in the penal laws of the United States, by substituting milder punishments for certain crimes, for which infamous and capital punishments are now inflicted;" and again, a year later, of a committee "to inquire whether any and what alterations are necessary in the penal laws of the United States, and that they report by bill or otherwise." Of both these committees he was made chairman, but it is believed that neither filed any report.

The President, Mr. Jefferson, appointed him in 1801 attorney of the United States for the district of New York. The same year, the Council of Appointment at Albany selected him for the mayoralty of New York City. As mayor, he urged the establishment of a public institution, to be jointly maintained by the city government and the Mechanics' Society, for the employment of (1) strangers, during the first month of their arrival; (2) citizens who from the effects of sickness or casualty have lost their usual employment; (3) widows and orphans, incapable of labor, and (4) discharged or pardoned convicts from the state prison. In his communication to the society, setting forth this scheme, which was not carried into effect, he says of the penitentiary system, then in its infancy, "It is a great, I had almost said a godlike experiment, worthy of the free country in which it is made, honorable to the men who planned and highly creditable to those who conduct it." But he pointed out that the unreformed, discharged convict is the chief obstacle to the hopes of its friends, and remarks: "Thus the institution, instead of diminishing, may increase the number of offences. This partial defect, so easily remedied, may ruin the system, and put a stop to the fairest experiment ever made in favor of humanity."

In 1803, a serious epidemic of yellow fever devastated the city, causing a general exodus of the inhabitants. The mayor remained at his post, visiting the sick at their homes in person, and doing all in his power to alleviate their calamity and distress, even to the point of exhausting the supply of wine in his private cellar, so that when at last, he himself succumbed to the disease, and his physicians called for a bottle of Madeira to be administered to him, there was not a bottle of that or any other kind of wine to be found in his house. During this period of absorbing labor and anxiety, a great misfortune



E. Livingston

befell him. Customs collections were at that time paid to the District Attorney. Not through any act of his own, but in consequence of the rascality of one of his subordinates, it was discovered that he was indebted to the government in the sum of nearly fifty thousand dollars. "Without waiting even for an adjustment of his accounts, he voluntarily confessed judgment in favor of the United States for $100,000 in order to cover the amount which the adjustment should show to be the real balance against him. At the same time he conveyed all his property to a trustee for sale, and an application of the proceeds to the payment of his debt. The property conveyed consisted of real estate, which, though not very marketable, he valued at a sum sufficient for the security of the government. And he immediately resigned both offices." In December, within two months after retiring from the mayoralty, he embarked for New Orleans, the metropolis of the Louisiana Territory, which had been ceded that year by Napoleon to the United States.

His reputation, and the letters he carried with him, insured him from the beginning a commanding position at the bar. He could speak French, Spanish and German; and he had much more than the ordinary practitioner's acquaintance with Roman law. "He had been in Louisiana but little above a year, when the legislature adopted an entire system of practice proposed and framed by him. It is embodied in an act, passed on the 10th of April, 1805, consisting of twenty-two sections, and extending only to twenty-five printed pages."

During that period of stirring events of which the culmination was the battle of New Orleans, Livingston, who had served in Congress with Andrew Jackson, having been duly commissioned as a captain of engineers, served as a volunteer aid to the General, and was in fact his principal and most trusted adviser.

In 1820, he was elected a member of the lower house of the Louisiana legislature, which named him as a member of a commission of three to prepare a code of civil rights and remedies. In 1821, he was elected by joint ballot to revise the entire system of criminal law of the state.

The province of Orleans, even under French rules was governed by the penal laws of Spain, which were continued in force by different acts of Congress, until 1812, when Louisiana ceased to be a territory; but a like provision was inserted in the constitution of the new state. There were a few offenses which were defined and tried according to the common law of England; but Livingston, quoting Lord Bacon,

said of the medieval code which it was his aim to replace: "Our laws endure the torment of Mezentius, the living die in the arms of the dead."

The Livingston Code, which is styled "A System of Penal Law," was divided into four parts: A code of crimes and punishments, a code of procedure, a code of evidence, and a code of reform and prison discipline, besides a book of definitions. The machinery proposed for the working of the system comprehended a house of detention, a penitentiary, a house of refuge and industry, and a school of reform. He proposed and urged the abolition of the death penalty. "He offered a substitute which, whatever might prove its effect as a public example, would certainly not have held out to the ordinary transgressor an alternative much less terrible than death. It was imprisonment for life in a solitary cell, to be painted black without and within, and bearing a conspicuous outer inscription, in distinct white letters, setting forth the culprit's name and his offense, and proceeding with a fearfully graphic description of his doom: 'His food is bread of the coarsest kind; his drink is water mingled with his tears; he is dead to the world; this cell is his grave; his existence is prolonged, that he may remember his crime and repent it, and that the continuance of his punishment may deter others from the indulgence of hatred, avarice, sensuality, and the passions which lead to the crime he has committed. When the Almighty, in his due time, shall exercise toward him that dispensation which he himself arrogantly and wickedly usurped towards another, his body is to be dissected, and his soul will abide that judgment which Divine Justice shall decree.'"

Livingston was a believer in the strictly solitary form of imprisonment of convicts. His biographer says that "he obtained information and statistics from the other twenty-three states, as well as from Europe, and minutely examined and reviewed the whole history of the systems of Massachusetts, New York, and Pennsylvania. His conclusion was that under the best scheme of penal jurisprudence to be devised, the inflexible sentence of the law upon every convict of a penitentiary sentence should be confinement in a solitary cell, with sufficient wholesome but coarse food, but without occupation or any human attention, except needful ministration to physical wants and private religious instruction." While he sought to unite the punishment of crime with the reformation of the offender, it is evident that he laid undue relative stress upon retribution and deterrence as ends in prison discipline; also, that his conception of a

truly reformatory discipline was vague. He favored the gradual relaxation of the severity of solitary confinement; and among the privileges to be won by good conduct and general tractability, he laid emphasis on education, recommending the appointment of a teacher in prison, the granting of permission to read books of general instruction, and admission into a class for instruction. After a sufficiently prolonged period of solitude, too, the prisoner might even enjoy the privilege of laboring in association with other prisoners. And he proposed giving to every prisoner a share of the profits of his labor, on his discharge.

Like Dr. Wines, Livingston insisted that criminals are susceptible of reformation. In his own words: "Convicts are men. The most degraded and depraved are men; their minds are moved by the same springs that give activity to others; they avoid pain with the same care and pursue pleasure with the same activity that actuate their fellow mortals. It is the false direction only of these great motives that produces the criminal actions which they prompt. To turn them into a course that will promote the true happiness of the individual, by making them cease to injure that of society, should be the great object of criminal jurisprudence. The error, it appears to me, lies in considering them as beings of a nature so inferior as to be incapable of elevation, and so bad as to make any amelioration impossible; but crime is the effect principally of intemperance, idleness, ignorance, vicious associations, irreligion, and poverty,—not of any defective natural organization; and the laws which permit the unrestrained and continual exercise of these causes are themselves the sources of the excesses which legislators, to cover their own inattention or indolence or ignorance, impiously and falsely ascribe to the Supreme Being, as if he had created man incapable of receiving the impressions of good. Let us try the experiment, before we pronounce that even the degraded convict cannot be reclaimed. It has never yet been tried. . . . But to think that the best plan which human sagacity could devise will produce reformation in every case, that there will not be numerous exceptions to its general effect, would be to indulge the visionary belief of a moral panacea, applicable to all vices and all crimes; and although this would be quackery in legislation, as absurd as any that has appeared in medicine, yet to say that there are no general rules by which reformation of the mind may be produced is as great and fatal an error as to assert that there are in the healing art no useful rules for preserving the general health and bodily vigor of the patient."

He clearly apprehended the desirability of separating juvenile offenders from mature and experienced criminals, and aimed to provide for them in a separate establishment—a school of reform, for which the state of Louisiana, so many years after his death, has made tardy provision; but it is not even yet completed and occupied. The only hint of his acquaintance with the underlying principle of the indeterminate sentence is the provision that, irrespective of the length of the sentence pronounced upon a juvenile delinquent, no boy should be discharged during his minority, except by apprenticeship; but for girls, the age limit was fixed at nineteen years. His penal code was based on the principle of definite, inflexible, time sentences throughout.

Another feature of his system was the recognition of the intimate relation between crime and voluntary pauperism in the form of idleness or vagrancy. He regarded remunerative employment as the surest antidote to crime, and dreaded the influence of lack of employment on the discharged convict, since it could only tend to insure his relapse and possibly final downfall. He thought, too, that governments are morally obligated to support such members of society as are incapable of maintaining themselves, and have the "corresponding right to test the genuineness of that of incapacity; a right which cannot be exercised without at the same time exercising a strict tutelage and thorough control over all who either are incapable of self-support or pretend to be so." Hence he made a house of refuge and of industry an integral part of his completed scheme; and he proposed placing the entire group of institutions under a single governing head.

Much in this account of his views and his aims reminds one of the very similar opinions of Vilain XIV, who was in a very real sense the father of modern penitentiary reform.

Before finishing the task to which he had been assigned, he was again in 1822, elected a member,—but from the New Orleans district,—of the national House of Representatives. He continued to give his spare time to its prosecution, and the four codes were in large part ready for the press—indeed, some fifty pages were already in type—when, in November, 1824, at his residence in New York, a conflagration in the middle of the night destroyed the manuscript copy and nearly all the notes used in its preparation. Nothing remained for him to do, but to rewrite the whole.

After six years in Congress, he failed, in 1828, of re-election, but was, at the next session of the Louisiana legislature, elected to

the United States Senate, taking his seat in that august body on the day of the inauguration of his friend, General Jackson, as President. He obtained leave to introduce a bill, accompanied by a memorial for the incorporation, into the federal statutes, of the code which he had prepared for his adopted state. It was printed, for further consideration, but at the ensuing session its author had ceased to be a senator, and the subject has not again been taken up by Congress.

President Van Buren tendered him, in 1831, the position of Secretary of State, which he accepted. During his first year of service as a member of the cabinet, occurred the official visit of M. de Tocqueville to the United States, for the purpose of examining our penitentiary system. It needs scarcely be said that Mr. Livingston did everything in his power to facilitate his studies.

On the 29th of May, 1833, he resigned the office of Secretary and was appointed Envoy Extraordinary and Minister Plenipotentiary to France. He returned to America in 1835, and died in 1836.

No American book has ever attracted such attention from the civilized world or been so universally and so highly praised, as Livingston's Code. Victor Hugo said of it: "Un beau livre, un livre utile, un livre modèle." It was reprinted in England and in France. The great German jurist, Mittermaier, who had never met Livingston, before he could present his letters of introduction, rushed into his arms at his hotel and hugged and kissed him. M. Villemain, the French publicist, wrote him: "Such a reform in penal jurisprudence reflects more credit upon our modern times than the greatest discoveries in the arts, in literature, and in science; in fact, it is the perfecting of the first of sciences—social science!"

Those who may wish to know more about this remarkable man in detail are referred to the delightful memoir of him by Charles Havens Hunt,* of which the foregoing sketch is mainly a mere abridgment, much of it in the very words of his biographer.

It is only just to the memory of Jeremy Bentham, to add that Livingston acknowledged in a personal letter to him, that the perusal of his writings first gave method to his ideas, and taught him to "consider legislation as a science governed by certain principles applicable to all its different branches, instead of an occasional exercise of its powers, called forth only on particular occasions, without relation to or connection with each other."

* Published by Appleton, N. Y., 1864.

Dorothea Lynde Dix

Miss Dix was of New England birth and parentage, Maine claiming her as a native, where she was born April 4, 1802, though her early life was spent in Massachusetts. It was there that she began her work for jails and prisons, by securing certain reforms in the East Cambridge jail. That was in 1841. By the year 1845 she had traveled more than ten thousand miles in the United States and had studied the conditions of eighteen state penitentiaries, three hundred jails and houses of correction and more than five hundred almshouses, as we know from the notes she made. Her Remarks on Prisons and Prison Discipline in the United States was published in 1845.

Yet all this was but the day of small things, compared with what she accomplished later, for she not only visited every part of the United States, from Maine to California, but Canada and Nova Scotia. She spent two years in England and on the Continent studying the conditions of prisons and the care of the insane, in nearly every country, everywhere influencing legislation in behalf of reform. More than twenty legislatures in this country, the federal government and the British Parliament recognized her services by formal resolutions. Wherever she went she found something that called out her service, as, for instance, securing proper life-boats for the storm-lashed shores of Sable Island, with the result that the very next day after her boats arrived there, one hundred and eighty persons were saved from a wreck, who must have perished but for this timely provision.

During the Civil War Miss Dix served as a nurse, and later had charge of a great part of the nursing force; and when the war was over she raised money to build a soldiers' monument, and more than twelve thousand sleep under its protection in one of the national cemeteries, where it stands "the first object visible over the low level of the peninsula to vessels coming in from sea to the Roads, the reverential tribute of a heroic woman to the heroic men she honored with all her soul." In recognition of her work the United States government gave the following order: "In token and acknowledgment of the inestimable services rendered by Miss Dorothea L. Dix for the Care, Succor and Relief of the Sick and Wounded Soldiers of the United States on the Battle-field, in Camps and Hospitals during the recent War, and of her benevolent and diligent labors and devoted efforts to whatever might contribute to their comfort and welfare, it is ordered that a Stand of Arms of the United States National Colors be presented to Miss Dix."

D. L. Dix.—

These beautiful flags were bequeathed by Miss Dix to Harvard College, where they hang over the main portal of the stately building erected in memory of the sons of Harvard who fell during the war.

Miss Dix died July 17, 1887, and it was said of her at that time that she was "the most useful and distinguished woman America has produced." Her biographer, Francis Tiffany, gives her a still higher place: "Here is a woman who, as the founder of vast and enduring institutions of mercy in America and Europe, has simply no peer in the annals of Protestantism. To find her parallel in this respect, it is necessary to go back to the lives of such memorable Roman Catholic women as St. Theresa of Spain or Santa Chiara of Assisi."

Ellen Cheney Johnson

Ellen Cheney Johnson was born at Athol, Massachusetts, December 20, 1829. She received her education in the public schools and at the Francestown Academy in New Hampshire. She married Jesse C. Johnson, a merchant of Boston. Both she and her husband were interested in philanthropic work, and for many years their home near the State House, was a gathering place for public spirited citizens. She was active in the work of the Sanitary Commission during the Civil War, and afterwards continued her work in behalf of the widows and orphans of soldiers. She was an early advocate of a separate prison for women and was one of those whose efforts led to the creation of the Reformatory Prison for Women that was opened in 1877. She was appointed a member of the Board of Commissioners of Prisons when it was reorganized in 1879, and in January, 1884, was appointed superintendent of the Reformatory Prison for Women at Sherborn, Massachusetts. Her work at that place made it a world-famous model of prison administration. She died in London while in attendance upon the Women's Congress, where she went to speak on prisons for women, on June 28, 1899.

Gardiner Tufts

Gardiner Tufts was born in the city of Lynn, Massachusetts, July 3d, 1828. He was said to be a lineal descendant of Edmund Ingalls, the first settler of Lynn. He was the son of Deacon Richard and Rebecca Tufts. In 1854 he married Miss Margaret A. Harris of Ipswich, who, with three daughters, survived him.

At the age of thirty-two Colonel Tufts was elected a member of the state legislature. In 1862 he was appointed by Governor An-

drews as Military Agent of Massachusetts, with office at Washington, D. C., the first appointment of its kind, it is said, by any governor. This position he held all through the Civil War. Remaining in the state employ, he was afterward appointed treasurer and steward of the Reformatory Prison for Women at Sherborn, and after a few months' service in this position, he was made superintendent of the State Primary School, at Monson. In 1885 he was chosen by Governor Robinson to be superintendent of the new State Reformatory, and on December 20 of that year he formally opened it and served most efficiently till the time of his death.

Colonel Tufts died November 23d, 1891, of pneumonia, after a brief illness. This was brought on by a severe cold contracted during his attendance at the National Prison Congress, held in Pittsburgh a few weeks before. Funeral services were held at his house, and immediately afterward in the guardroom of the Reformatory; and in the afternoon of the same day at Lynn, in the old First Church. He was buried with military honors, the services being in charge of the Loyal Legion. A bust of Colonel Tufts was placed in the State House, Boston, and a fine portrait of him hangs in the chapel of the Reformatory.

INDEX

INDEX

ADLER, FELIX: Extract from address on manual training, 20

ADMINISTRATION. See *Discipline*

ALABAMA: Commutation of sentence law, 24

ALTRUISM IN OUR PRISON SYSTEM, 93

AMERICAN PRISON ASSOCIATION: Financial support, 84; Hayes, R. B., presidency, 84, 142; Organization and first congress, 78; Reorganization in 1883, 141; Wines, E. C., secretaryship, 75. See also *Cincinnati Prison Congress*

AMERICAN REFORMATORY PRISON SYSTEM (Z. R. Brockway), 88

AMERICAN SOCIAL SCIENCE ASSOCIATION, 76, 78

ARISTOTLE AND PLATO: Conceptions of goodness and virtue, 89

ARSON: Defined, 109

ATTITUDE OF THE STATE TOWARD THE PRISON SYSTEM, 93

AUBURN SYSTEM OF PRISON DISCIPLINE, 4

AVERAGE SENTENCES, 120

BACON, FRANCIS: Quotation from, 89

BARROWS, ISABEL C.: Breshkofsky, Madame, devotion to, 124, 125; Marriage, 127; Medical studies and skill in stenography, 127; Sharing of life work with Mr. Barrows, 126

BARROWS, SAMUEL JUNE: Birth, 126; Camp life in Canada, 138; article on (by P. U. Kellogg), 123-139; "Citizen of the world," 136; Death, 123; Early life and privations, 126; Election to Congress, 128; Family life and wide sympathies, 138; Federal penal reforms, 131; Fee system, fight against, 130; Hungarian speech at Budapest, 137; International Prison Commission;—Reports, 132; Tributes, 134; International Prison Congress, work for, 129, 134; Interparliamentary Union, interest in, 128; "Isles and shrines of Greece," 138; Marriage, 127; Ministry in Dorchester (Mass.), 128; Musical and linguistic talents, 137, 138; Prison Association of New York, secretaryship, 129; Religious opinions, 135; Varied activities in the cause of prison reform, 132; Western experiences, 128; The wireless message, 124

BECCARIA, CESARE, 86

BIOGRAPHICAL SKETCHES, 145–160

BONNEVILLE DE MARSANGY: First argument for conditional liberation, 38

BOSTON PRISON DISCIPLINE SOCIETY, 4

BRESHKOFSKY, MADAME, 124, 125

BRITISH SOCIAL SCIENCE ASSOCIATION, 78

BROCKWAY, Z. R.: American reformatory prison system, 88; Early advocacy of indeterminate sentence, 31, 32; Experience in prison administration, 77; Genius and hero, 87; Superintendence of Elmira Reformatory, 32, 33

BURGLARY: Defined, 108

BURNHAM INDUSTRIAL FARM, 143

CALIFORNIA: Commutation of sentence law, 14

CAPITAL PUNISHMENT: Death penalty in various states, 119; Livingston, Edward, proposed substitute, 154

CAPITALISTS OF CRIME, 42, 56

CENTRALIZATION OF CONTROL OF STATE PRISONS, 5, 63

CINCINNATI PRISON CONGRESS (1870): Account, by F. B. Sanborn, 78, 79; "Declaration of principles," 39; Analytical index, 35; Completeness, 3;

Discussion and condensation, 78; Text as adopted, 39; Text as originally submitted by Dr. Wines, 45; Unanimous adoption, 34; Vote for calling international congress, 34

Classification of Prisoners and Prisons: Cincinnati Congress declarations, 39, 41, 46, 54; Three general divisions of prisoners, 95

Clothing and Bedding for the Prisoners in Reformatories, 99

Colonial Conditions: Intercourse, etc., 1

Community of Interest Between Offenders and the State, 94

Commutation of Sentence: Federal prisoners in state prisons, rights of, 14; Legislation by various states, 13, 14. See also *Sentence, length of*

Conditional Liberation. See *Indeterminate Sentence*

Connecticut: Commutation of sentence law, 14

Construction: Cincinnati Congress declarations, 43, 61–62; Reformatories, best type of buildings, 99

Contract System. See *Labor-Contract System*

Convict Labor. See *Labor*

Corporal Punishment: Irrational and ineffectual, 12; Physical coercion sometimes requisite, 98

Crime: Defined, 39, 45; Prevention of, Cincinnati Congress declarations, 41, 55

Criminal Capitalists, 42, 56

Criminal Insanity: Cincinnati Congress declarations, 42, 56

Criminal Law in the United States. See *United States Criminal Law*

Criminal Lunacy. See *Criminal Insanity*

Criminal Procedure in the United States. See *United States Criminal Procedure*

Criminal Statistics: Cincinnati Congress declarations, 43, 60; Value affected by variations in codes, 110

Criminaloid Class, 94

Crofton, Sir Walter, 16, 26, 27, 76

Death Penalty. See *Capital Punishment*

Defectives: Prisoners of inferior class, 95; Special treatment at Elmira Reformatory, 96

Definitions of Crimes, 108

Deterrent Principle in Punishment 91

Discharged Prisoners: Cincinnati Congress declarations, 42, 56

Discipline: Abolition of cruel punishments in New York, 10; Auburn system, 4; Cincinnati Congress declarations, 41, 46–48, 50, 51; Contract system, demoralizing to discipline, 8; Disciplinary punishments, necessity of, 5; Fundamental principles, 18; Irish convict system, 27; Mark system, 26; Moral axioms, 18; Opposing theories of government, 11; Pennsylvania system, 4, 146, 154; Political control, effect of, 6; Rewards and punishments, 12, 39, 46; Social principle, necessity of recognizing, 55

Disgrace not Often Felt by Prisoners, 92

Disregard of Consequences by Criminals, 91

Dix, Dorothea Lynde: Biographical sketch, 158

Drummond, Professor: Remarks on value of work, 107

Dwight, Theodore W.: Biographica sketch, 150; Contract system, characterization of, 7; Investigation (with Dr. Wines) of prisons in the United States and Canada, 17

Education: Cincinnati Congress declarations, 40, 49; Duty of the state, 20; Moral, mental, and industrial instruction, 19; Schools of letters in a reformatory, 100. See also *Industrial Training; Moral and Religious Training*

Eliot, George: Quotations from, 97

Elmira Reformatory: Brockway, Z. R., superintendency, 32, 33; Commission on site and plan, appointment, and report, 26, 29; Completion of building, 32; First suggestion of industrial reformatory, 32; Indeterminate sentence in act of incorporation, 32

Fee System: Fight against, 130

Fines: Variations in, 112

Goodness: Defined by Plato and Aristotle, 89

Greece: Description of scenery (E. C. Wines), 74

Hartwell, E. H.: Quotation from, 97

Hayes, Rutherford B.: American Prison Association, presidency, 84, 142; Biographical sketch (W. M. F. Round), 140; United States, presidency, 84, 140, 143

Howard, John, 52, 86

Howe, Samuel G.: Conditional liberation, 30; Experiences in Greece, 72

Hubbell, Gaylord B.: Irish Convict system, 27; Political control at Sing Sing prison, 6; Proposed reformatory prison in New York, 28

Illinois: Commutation of sentence law, 14

Impossibility of Perfect Justice, 90

Imprisonment for Life in Various States, 117

Imprisonment, Terms of. See *Sentence, Length of*

Indemnification for Wrongful Imprisonment, 42, 56

Indeterminate Sentence: Bonneville de Marsangy, first declaration of principle, 30; Brockway, Z. R., early advocacy, 31, 32; Cincinnati Congress declarations, 40, 48; Howe, S. G., early mention of conditional liberation, 30; Protecting society from crime, 95; Recommendation in first report of Elmira Reformatory commission, 29; Time sentences wrong in principle, 18

Industrial Training: Cincinnati Congress declarations, 41, 52; Manual training and trades instruction in reformatories, 100; Reformatory possibilities of work, 107; Value of manual training, 20

Interaction of Body and Mind, 97

International Prison Commission: Reports edited by S. J. Barrows, 132; Tributes to S. J. Barrows, 134

International Prison Congress: Barrows, S. J., services, 129, 134; London Congress (1872), 37; Refusal of appropriation by Congress in 1876, 83; Sollohub, Count, earliest suggestion, 33; Stockholm Congress (1878), 37; Vote passed by Cincinnati Congress, 34; Wines, E. C., work of, 36, 75, 80

Iowa: Commutation of sentence law, 14

Irish Convict System, 27

John Howard Industrial School, 130

Johnson, Ellen Cheney: Biographical sketch, 159

Jury, 97, 99, 101, 106

Juvenile Courts. See *Children's Courts*

Juvenile Delinquents: Youthful misdemeanants, 130. See also *Children's Courts; Probation*

Kansas: Commutation of sentence law, 14

Kellogg, Paul U.: "Samuel June Barrows, a circuit rider in the humanities," 123

Labor: Competition with free labor, 52. Contract System; Cincinnati Congress declarations, 41, 53; Discipline, demoralization of, 8; Education of prisoners rendered impossible, 20; Improvement on idleness, 5; Objections, 7. New York: Investigating commission's conclusions, 24; Large earnings of state prisons, 22; Proposed law, 24; Overwork system, 9, 12; Productive or profitable labor, 21, 22, 23

Ladd, Professor: Quotation from, 102

Lewis, Charlton T., 86

Libraries in Prisons and Reformatories, 19, 100

Lieber, Francis: Biographical sketch, 145; Books and translations, 150; Criminal procedure, views on, 148; Opinions, 148; Theory of punishment and pardons, 147

Livingston, Edward: Ancestry and birth, 151; Death, 157; Louisiana criminal code, 153; New York City, mayoralty of, 152; Penal code, 154; Solitary imprisonment, belief in, 154; Substitute for death penalty, 154; United States penal code, 157

MACONOCHIE, ALEXANDER, 26, 46, 77, 86

MAINE: Commutation of sentence law, 14

MARK SYSTEM OF PRISON DISCIPLINE, 26

MASSACHUSETTS: Commutation of sentence law, 14

MICHIGAN: Commutation of sentence law, 14

MILLIGAN, REV. JOHN L., 16

MIND AND BODY: Relation between, 102

MINNESOTA: Commutation of sentence law, 14

MISDEMEANANTS: Lack of provision for, 130

MISSOURI: Commutation of sentence law, 14

MONTESINOS, COLONEL, 52, 86

MORAL AND RELIGIOUS TRAINING: Moral suasion and religion, 106; Optional religious opportunities, 101; Regenerating influence of religion, 19, 40, 48; Religious agencies not always desirable, 98

MORAL STATE OF PRISONERS, 89

NATIONAL PRISON ASSOCIATION. See *American Prison Association*

NATIONALITY IN PENAL SYSTEMS, 3

NEVADA: Commutation of sentence law, 14

NEW HAMPSHIRE: Commutation of sentence law, 14

NEW JERSEY: Commutation of sentence law, 14

NEW YORK: Centralization of control of state prisons, 5; Commutation of sentence law, 13, 14; Constitutional amendment, proposed, 10; Prison Association (see *Prison Association of New York*); Proposed prison labor law, 24; State Reformatory at Elmira. See *Elmira Reformatory*

NEWSPAPERS IN PRISONS AND REFORMATORIES, 60, 101

OFFICERS OF PRISONS AND REFORMATORIES, 48, 49

OHIO: Commutation of sentence law, 14

OREGON: Commutation of sentence laws, 14

ORGANIZATION OF REFORMATORIES, 97

OVERWORK SYSTEM OF PRISON LABOR, 9, 12

PARDONS: Cincinnati Congress declarations, 43, 57; Lieber, Francis, theories, 147

PARENTAL RESPONSIBILITY, 44, 62

PENNSYLVANIA: Commutation of sentence law, 14; Prison Society, 4

PENNSYLVANIA SYSTEM OF PRISON DISCIPLINE: Brief definition, 4; Lieber, Francis, advocacy, 146; Livingston, Edward, belief in solitary imprisonment, 154

PENOLOGICAL SURGERY, 99

PENOLOGY: Word coined by Dr. Lieber, 146

PHILADELPHIA PRISON DISCIPLINE SOCIETY, 4

PHYSICAL CULTURE IN REFORMATORIES, 100

PHYSIOLOGICAL DEFECTS AS SOURCES OF CRIME, 96

PLATO AND ARISTOTLE: Ideas of goodness and virtue, 89

POLITICAL CONTROL OF PRISONS: Hubbell, G. B., testimony, 6; Instability of administration, 39, 47; Political appointments not necessarily bad, 5; Prison Association of New York, efforts at reform, 4, 8; Proposed constitutional amendment in New York, 10

POSSIBLE AND ACTUAL PENALTIES FOR CRIME (F. H. Wines), 108

PREPARATORY LIBERATION (Bonneville de Marsangy), 30

PREVENTION OF CRIME. See *Crime, Prevention of*

PRISON ADMINISTRATION. See *Discipline*

PRISON ARCHITECTURE. See *Construction*

PRISON ASSOCIATION OF NEW YORK: American Prison Association, part in organizing, 76; Barrows, S. J., secretaryship, 129; Commission to investigate prisons in the United States and Canada, 17; Income at different periods, 76; Investigation commission of 1866, 8; Political control, war against, 4, 8;

Reconstruction of New York prison system, committee appointed, 16; Wines, E. C., secretaryship, 4, 15, 75, 76

Prison Construction. See *Construction*

Prison Discipline. See *Discipline*

Prison Labor. See *Labor*

Prison Libraries, 19, 100

Prison Newspapers, 60, 101

Prison Officers, 48, 49

Punishment: Definitions, 39, 45; Theories, 88

Queens County (N. Y.): Jail, 130, 131

Reformation: American reformatory prison system (Z. R. Brockway), 88; Cincinnati Congress declarations, 39–41, 45–52; Contract system opposed to reformation, 7; Economic motives, 105; Essential elements of the problem, 104; Livingston, Edward, opinions, 155; Mental physiology in reformatory procedure, 102; Physical training, 105; Primary object of penal justice, 17, 39, 46; Standard of requirements, 94; Stringency and strenuosity in administration, 103

Religious Training. See *Moral and Religious Training*

Responsibility: Parental responsibility, 44, 62; Responsibility of society for crime, 42, 57

Retributive Theory of Punishment, 88

Rewards and Punishments in Prison Discipline, 12, 39, 46

Rhode Island: Commutation of sentence law, 14

Ribot: Quotation from, 96

Robbery: Defined, 109

Round, W. M. F.: Biographical sketch of Gen. R. B. Hayes, 140

Sanborn, Frank B.: "E. C. Wines and prison reform: a memoir," 64

Sentence: Length of; Average sentences, 120; Cincinnati Congress declarations, 41, 43, 54, 59; Possible and actual penalties for crime, 108

Seward, William H.: Gift of prison library, 19

Seymour, Horatio, 86

Sing Sing Prison: Evils of political control, 6

Solitary Confinement. See *Pennsylvania System of Prison Discipline*

Sollohub, Count: Characterization of America, 3; Prison industries, 52; Suggestion of an international prison congress, 33, 80

State Control of Prisons, 5, 63

Supplementary Penalties, 113

Tappan, A. B.: Proposal for an industria reformatory in New York, 25

Tchaikofsky, Nicholas, 125

Tennessee: Commutation of sentence law, 14

Tufts, Gardiner: Biographical sketch 159

Variations in Severity of Penalties Prescribed, 114

Vaux, Richard: Estimate of Dr. Wines, 70

Vermont: Commutation of sentence law, 14

Virtue: Defined by Plato and Aristotle, 89

Wheeler, William A., 11

Wines, Enoch Cobb: American Prison Association, secretaryship, 75; Books on travel and education and on China, 67; Character and influence, 71; Dates of birth and death, 65; "Declaration of principles (Cincinnati Congress of 1870), formulation of, 3, 4, 34, 39, 45; Easthampton (N. Y.) pastorate, 70; Education and marriage, 66; Educational work, 67, 68; Fundamental principles of prison discipline, 18; Greece, travels and descriptions, 72–75; Honors and achievements, 37, 82; International Prison Congress, work for, 36, 75, 80; Investigation (with Dr. Dwight) of prisons in the United States and Canada, 17; Labor investigation commission, membership, 24; Memoir (by F. B. Sanborn), 64; Mosaic legislation, book on, 69; Prison Association of New York, secretaryship, 75, 76; Services to prison reform in New York, 25;

Sketch of life and services (by F. H. Wines), 3–38; Slavery, views on, 68, 69; "State of Prisons," publication, 38, 87; Travel, study and correspondence, 15, 16, 77; Union with Messrs. Sanborn and Brockway in prison reform work, 4; Vaux, Richard, warm admiration, 70; Washington College (Pa.), professorship, 70; Zeal and sincerity, 81

WINES, FREDERICK HOWARD: Historical introduction, 3; Possible and actual penalties for crime, 108

"THE WIRELESS MESSAGE" (S. J. Barrows), 124

WISCONSIN: Commutation of sentence law, 14

WOMEN IN PRISON ADMINISTRATION, 45

CRIMINAL LAW IN THE UNITED STATES

RUSSELL SAGE
FOUNDATION

CRIMINAL LAW IN THE UNITED STATES

By
EUGENE SMITH
PRESIDENT OF THE PRISON ASSOCIATION OF NEW YORK

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PREFACE

The following chapters upon Criminal Law in the United States have been written upon the invitation of Dr. Barrows, the late president of the International Prison Commission, for submission to that body at its meeting to be held at Washington, D. C., in the year 1910. There are several admirable works, treating in detail the criminal laws of the various states and the judicial decisions relating to them, which are widely known and readily accessible. The present occasion calls for no such general and comprehensive treatise, which, indeed, the proper limitations of space also forbid. The object of the present writer is simply to present, from a penological point of view, certain distinctive and characteristic phases of the criminal law in the United States and especially those that, by reason of the dual form of government existing in this country, arise from the relations of the several states to each other and to the federal authority. Adverse criticism of the penal codes and of the punitive system in the treatment of crime must be regarded, not as a condemnation of institutions peculiar to the United States alone, but as an arraignment of the whole theory of retributive punishment for crime; a theory which now underlies and pervades the criminal law of all civilized nations.

The topics thus proposed are such, it is hoped, as will have a special interest for the representatives of other countries desiring a more intimate acquaintance with the problems incident to the forms of government in this country and with the prevailing trend of thought and effort now affecting the development of the criminal law in the United States.

EUGENE SMITH

NEW YORK, October 27th, 1909

TABLE OF CONTENTS

PAGE

CHAPTER I

Relations between the Federal Government and the Several States 1

CHAPTER II

Criminal Law within Federal Jurisdiction 14

CHAPTER III

Criminal Law within the Jurisdiction of the States 38

CHAPTER IV

The Punitive System of Criminal Law 57

CHAPTER V

The Indeterminate Sentence 65

CHAPTER VI

Children's Courts and Probation Officers 75

CHAPTER VII

Criminal Procedure in the United States 94

INDEX 115

CHAPTER I

RELATIONS BETWEEN THE FEDERAL GOVERNMENT AND THE SEVERAL STATES

THE original thirteen English colonies in North America, when they declared their independence in 1776, occupied a territory that stretched a thousand miles along the Atlantic coast. These colonies had been founded at different times and under different auspices, and the oldest of them had already had a history of one hundred and fifty years. Their historical development had been on lines so separate and distinct that each colony possessed its own characteristic features, impressed upon the habits and pursuits of its people. Long distances separated those colonies that were the most remote from each other, there were few good roads, and the means of inter-communication then available were most meagre. Thus, personal acquaintanceship and social commingling between the people of different colonies was necessarily difficult and extremely limited. There was another reason which was adverse to the formation of community of interest and feeling between the colonies, and even tended to separate them more widely from each other. With these early colonists the struggle for existence was severe, and their main dependence was upon foreign commerce; in their efforts to foster foreign trade the colonies were distinctly hostile rivals, each against the others. Their intercourse with each other being mostly by way of coast-wise commerce, they came to regard each other as foreign communities, like the countries over-sea with which they traded. So, as the years passed, the colonies had interests growing more and more in conflict, which made their attitude toward each other one not indeed of positive alienation but of natural jealousy and rivalry.

The one, and possibly the only, bond of union between the colonies consisted in the common aspiration for freedom from British rule, and the only possible hope of winning such freedom depended upon combined action. They did unite in declaring their independence, but immediately after such declaration the thirteen colonies, each acting as before, separately from the others, proceeded to

erect themselves into independent states; each state organized its form of government, adopted a constitution and body of laws, created public offices and filled them by election, and exercised the functions of a sovereign power. For the prosecution of the Revolutionary War, the states formed an alliance with each other, represented by the Continental Congress. But this Congress effected a very weak and limited union of the states, as its measures were practically dependent upon their adoption and ratification by the several states. To enlarge the powers of Congress, the Articles of Confederation were adopted by the states in 1781 and continued in force until the year 1789. It was still found that the central government was but a league between sovereign states, lacking power to enforce its decrees and to coerce the states to obey them. In the meantime, the several states had been concentrating their political energies, each in strengthening the organization of its own government and in developing its own system of laws, while so dull an interest was taken in the general Congress that it was often difficult to secure the attendance of a quorum of delegates at its meetings.

The adoption of the present Constitution of the United States in 1789 marks the really effective beginning of the United States as a sovereign power among nations. At the time of its adoption, the states, each in its separate domain, were exercising all the powers of a supreme government, hampered but little if at all by the Articles of Confederation. By the Constitution, a federal government was erected, with power to enact laws and issue judicial decrees which were clothed with supreme authority throughout the Union, any state law or judgment to the contrary notwithstanding. But the subjects and interests which were thus submitted to the exclusive control of the federal government were closely limited and defined by the Constitution; and all the powers of government which were not so submitted remained as they were before in the separate states.

"It cannot be denied that the sum of all just governmental power was enjoyed by the states and the people before the Constitution of the United States was formed. None of that power was abridged by that instrument, except as restrained by constitutional safeguards, and hence none was lost by the adoption of the Constitution. The Constitution, whilst distributing the pre-existing authority, preserved it all." *Northern Securities Co. v. United States* (193 *U. S. Rep.* p. 399).

To this distribution of sovereignty between the federal government and the several states is owing the existence of numerous sys-

tems of criminal law within the United States. There is, first, the federal system, confined to offenses against federal laws, which is supreme through all the states and pervades all the national dominions. Then, each of the forty-six states of the Union has its own distinctive system of criminal law historically developed, each system variant, and sometimes widely so, from every other system, but prevailing only within the boundaries of the state to which it belongs. And, finally, each of the territories and outlying possessions of the United States has its peculiar body of criminal statutes.

The theory upon which these multifarious systems operate has been succinctly stated by Judge Brewer in the case of *South Carolina v. United States* (199 *U. S.* 437):

"We have in this republic a dual system of government, national and state, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the national government has absolute control and no action of the state can interfere therewith, and there are others in which the state is supreme and in respect to them the national government is powerless."

Underlying and to some extent harmonizing these diverse systems is the system of criminal law embodied in the Common Law of England. The jurisprudence of the several states (with a few exceptions) is based upon the Common Law, which was, of course, the law of the original colonies. Most of the states, by constitutional or statutory enactment, have expressly adopted the Common Law, as it existed at the time when the Union was formed, so far as it was adapted to their altered situation and circumstances. Even the states of Louisiana and Texas, whose laws are based upon the Civil, and not the Common Law, have adopted the latter as a part of their system of criminal law. Generally, where the states have thus preserved the Common Law, offenses which are crimes at the Common Law are indictable and punishable although not covered by any statute of the state. The presence of the Common Law also serves to impart to criminal procedure and to the interpretation of statutes an elasticity and flexibility which promote the ends of justice.

It has been held that the Common Law does not enter into the criminal law of the federal government, and that no offense is punishable as a crime in the federal courts unless it is declared to be criminal by a statute of the United States. Still, the Common Law has been a main element in the very atmosphere in which the whole system of

federal jurisprudence has grown up and received its nurture. The Constitution itself refers to the Common Law and provides (7th amendment) that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the Common Law." The Supreme Court of the United States has declared that the language of the Constitution "could not be understood without reference to the Common Law." *South Carolina v. United States* (199 *U. S.* 437). In all courts, both federal and state, the Common Law is constantly resorted to for definitions of crimes, for construction of legal terms and for rules of evidence and of practice, in the absence of statutes to the contrary or in case of ambiguity in the language of statutes. Indeed, the fundamental principles at the basis of all criminal law in the United States are taken directly from the Common Law. Some of them can be stated as follows: the right of trial by jury; the presumption of innocence until guilt is proved; no prisoner can be compelled to criminate himself nor be twice put in jeopardy for the same offense; no prisoner can be convicted for an offense which was made a crime only by an *ex post facto* law.

The Judiciary Act, passed by Congress in 1789, provides that the laws of the several states "shall be regarded as rules of decision in trials at Common Law in the courts of the United States in cases where they apply." By the practical operation of this act, the forms of procedure, the rules of evidence and the legal remedies prevailing in each state are adopted in the federal court held within such state. The result is that the beneficent principles of the Common Law, which pervade the laws and the judicial procedure of the states, gain a controlling force in the courts of the United States.

By the division of sovereignty between the nation and the states, the United States Congress, in legislating upon the subjects placed within its jurisdiction by the Constitution, has the power to enforce its laws by declaring their violation a crime and to fix in each case the punishment for such violation. There has thus grown up a body of statutory criminal law enacted by Congress and administered by the federal courts. The principal matters to which these criminal statutes extend are impeachment and treason, frauds affecting the revenue of the United States, counterfeiting the coin, paper money, bonds or other documents issued under federal authority, violation of laws regulating commerce, cases of admiralty or maritime jurisdiction, infraction of naturalization and suffrage laws and laws affecting the post office.

The Constitution, in declaring the powers of Congress, specifies the power to define and punish "offenses against the law of nations." Under this clause, Congress enacted a law making it a penal offense to counterfeit the notes, bonds and other securities of foreign governments. The constitutionality of this act was upheld by the Supreme Court of the United States. *United States v. Arjona* (120 *U. S. Rep.* 479).

The Constitution declares that all treaties made by the authority of the United States (as well as the laws enacted by Congress) shall be the supreme law of the land, "anything in the Constitution or laws of any state to the contrary notwithstanding." The power of Congress to pass penal statutes defining and punishing violations of its laws has not been questioned; and, inasmuch as the laws enacted by Congress and treaties made by the United States (both being placed upon the same footing) constitute the supreme law, Congress, it is claimed, has like power to pass penal laws declaring violations of treaties to be crimes and defining the punishment therefor. In the absence of such laws, however, the courts of the United States are powerless to punish the violators of treaty obligations. The judicial power of the United States extends, it is true, by the terms of the Constitution, to all cases arising under treaties made by the government; but it is settled that no criminal prosecution can be entertained in the federal courts except for an offense which is declared criminal, and for which the punishment is defined by an act of Congress. The failure of Congress to pass criminal laws for the enforcement of treaty obligations has given rise to diplomatic embarrassments.

In the year 1891, a mob in the city of New Orleans broke into the jail and killed three Italians (besides other prisoners) who were confined there awaiting trial. By the treaty then existing between the United States and Italy, the United States bound itself to secure the same protection to the subjects of Italy within this country as that granted to its own citizens. Italy promptly made demand upon the United States for the punishment of those guilty of the murder and for the payment of money damages. The United States was unable to respond to the first of these demands. If the murder was in violation of the treaty with Italy, such violation had not been declared a crime and the punishment therefor fixed by an act of Congress; hence, the federal courts were powerless to act. The secretary of state made answer to the demand of Italy that under our dual system of government the murder was an offense against the

laws of Louisiana and was cognizable and punishable only in the courts of that state; he could offer to the injured sovereignty of Italy only the good offices of the United States government in urging the state of Louisiana to bring the guilty persons to justice.

The obligation to enforce the treaty rested upon the United States; with the state of Louisiana the kingdom of Italy had no contract, and the averment that the United States had not the power to punish the violation of its treaty was not accepted by Italy as a satisfactory answer. The Italian ambassador was recalled from Washington and the suspension of all diplomatic relations between the two powers was imminent. The incident was finally closed the following year to the satisfaction of both parties by the payment by the United States to Italy of an indemnity of $25,000. Whether the United States had any legal claim upon the state of Louisiana for re-imbursement of the indemnity so paid or for other redress, is a question outside the boundaries of the criminal law.

This occurrence, which excited wide interest at the time, is here referred to because it led to a discussion of principles which was most interesting and highly instructive, regarding the dual nature of government in the United States. President Harrison in his annual message of 1891 called the event to the attention of Congress and suggested the passage of an act defining and punishing, as crimes, offenses against the treaty rights of foreigners within the United States. An act designed to that end was introduced in Congress, and the constitutionality and expediency of such a measure were widely debated both within and outside of Congress.

The advocates of the proposed legislation declared that the New Orleans incident had placed the United States in an undignified and humiliating position before the world; that, while the Constitution empowered the President and the Senate to make treaties with foreign powers, it was a gross defect in our governmental system that the United States should be left powerless to enforce the observance of the treaties within the states and to punish their violation. It was urged that this defect could be constitutionally remedied by a simple act of Congress; that the power and the duty of Congress in this direction were clearly defined by those clauses in the Constitution which declare that "all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land," that "the judicial power shall extend to all cases, in law and equity arising under . . . treaties," and that "the Congress shall have power . . . to define and punish . . . offenses

against the law of nations" and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof."

It was pointed out that in 1845, Congress, acting at the instance of Daniel Webster, then Secretary of State, upon the occasion of a somewhat analogous diplomatic imbroglio, had passed an act under which the trial of a foreigner held in custody by a state court in violation of a treaty of the United States or for an act claimed by him to have been done under authority of a foreign state, could be removed from the state court into a federal court. By this act, it was claimed that Congress had already asserted its power to confer jurisdiction on the federal courts in certain criminal cases arising under treaties, but that the terms of the act were not sufficiently comprehensive. In further support of the constitutionality of the proposed legislation, reference was made to the fact that a foreigner, suffering loss and damage through a violation of his treaty rights, could by the express terms of the constitution bring a civil action to recover damages in a federal court; and it was argued that, since the constitution had placed within the power of the federal judiciary all cases in law and equity arising under the laws and treaties of the United States, it was a fair presumption from the whole scope of the instrument that it was intended to include jurisdiction over all crimes committed in violation of such laws and treaties. Finally, as to the expediency of the proposed legislation, it was insisted that, in the division of sovereignty between the states and the nation upon which the Union was founded, the whole subject of foreign relations was committed to the exclusive control of the federal government; that the power to make treaties logically involved the power to enforce them; that, when a foreigner within one of the states was murdered or criminally injured, the foreign state of which he was a subject, if holding a treaty with the United States, had a right to demand that the United States should bring those guilty of the crime to trial and punishment; and that the United States, in executing a treaty which it was unable to enforce, thereby incurring obligations which it was powerless to fulfil, violated the law of nations, to say nothing of the law of common honesty.

On the other side, the opponents of the proposed law took the ground that it was in effect irreconcilable and in conflict with our whole scheme of government, and for that reason was inexpedient and even unconstitutional. In the division of sovereignty between the

states and the nation, the maintenance of peace and order in the community and the repression of crime were left to the states, and to the states exclusively, except in those limited localities where federal jurisdiction prevailed; and with the state's orderly administration of its criminal law the United States was powerless in any way to interfere, save only in cases of riot or insurrection, which grew to be beyond the power of the state to control, and then the federal intervention was to be by military force and not by judicial process. The criminal laws of the state, thus administered in the state courts, made absolutely no distinction whatever between natives and aliens; they bound, and were enforced against, every person within the boundaries of the state, citizens and foreigners alike; they applied without discrimination to every crime, whether the victim of the crime were a citizen or a foreigner. This was our system of government, published and known to the world, and every foreigner coming here was by this system immediately placed upon an exact level with the citizens as to all rights and duties under the criminal law.

The treaty with Italy in the respect under consideration was as favorable to that nation as any treaty ever made by the United States has been to the other party; its language was as follows:

"The citizens of each of the high contracting parties shall receive in the states and territories of the other the most constant protection and security for their persons and property and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives."

The opponents of the proposed law insisted that our existing scheme of government did give the Italians in New Orleans precisely the same rights and privileges as those granted to the natives. In the same riot in which the Italians were killed, some citizens of the United States were also killed; but the murderers of these latter were amenable only to the courts of Louisiana, and over their trial and punishment the government of the United States had no control and the federal courts had no jurisdiction. On what ground, it was asked, was the United States bound to afford greater or different protection to foreigners than to natives?

The treaty, it was claimed, imposed on the United States precisely the same obligation that the law of nations imposes, in the absence of any treaty; the obligation, namely, to protect foreigners within its borders against crime in the same manner and to the same extent that it protects its own citizens. But no treaty or law of nations requires a government to subvert its established institutions

in order to provide for resident foreigners a different kind of protection from that it affords for its own citizens.

In answer to the argument that, as the Constitution gave the federal courts jurisdiction over civil cases in favor of foreigners, the intention might be inferred to give like jurisdiction over criminal cases in their favor, it was urged that exactly the opposite inference should be drawn; the fact that jurisdiction was expressly given in civil cases, while no mention was made of criminal cases, suggested the application of that canon of interpretation which is embodied in the maxim *expressio unius, exclusio alterius.*

It was further argued that Italy had no right to demand that the guilty persons should be criminally tried and punished; that the only basis for such a demand was the desire for revenge. But revenge is no longer accepted as the proper motive of criminal prosecution. Protection of the public, and not vengeance upon the offenders, is the only legitimate aim of all criminal procedure. It follows that the enforcement of criminal law is solely for the benefit of the people of the state or nation that enacts the law; it is a matter in which no foreign power has any concern or right of control.

It was alleged that the treaty-making power was itself subject to the Constitution and that the central government has no power to enter into any treaty which conflicts with that distribution of sovereignty between the states and the nation which the Constitution effected; and that the proposed act would be unconstitutional, because it purported to transfer to federal jurisdiction what the Constitution had placed within state jurisdiction.

And, finally, it was insisted that the proposed legislation, whether unconstitutional or not, was inexpedient and wholly unnecessary, because the existing scheme of government enabled the United States to perform all its treaty obligations by affording to all foreigners within the country precisely the same protection and security that are enjoyed by its own citizens.

The arguments urged by the opposition prevailed—at least the proposed act failed to receive the support of Congress and the measure was abandoned.

Within very recent years a case has arisen involving principles similar to those just discussed, which has excited world-wide attention. I refer to the action of the city of San Francisco in excluding from its public schools certain resident subjects of Japan. The case has been largely, but erroneously, treated as if it raised an issue of state rights between the federal government and the state of

California. The first, and indeed the only, question that the case presents is whether the act of San Francisco was in conflict with the terms of the treaty between Japan and the United States. If the act deprived the Japanese affected by it of no right given them by the treaty or by the law of nations, Japan had, of course, no ground of complaint. But if the act of exclusion denied any subject of Japan a right secured to him by the treaty, the act was, beyond any possible controversy, unconstitutional and void; void because in conflict with the supreme law, of which the treaty formed a part.

If any state, or any municipality within a state, should enact a law which discriminated between citizens and foreign residents, to the disadvantage of the latter, in protection and security for their persons or property, and declare its violation a penal offense; and should a resident subject of a foreign power holding a treaty with the United States (of the "most highly favored nation" class), be indicted in the state court for violating such a law, he could obtain a writ of habeas corpus from a federal court (under the Act of 1845 mentioned above), which would afford complete redress. But the law would unquestionably be held void by any court, state or federal, when invoked against a right secured by international treaty.

Other clauses of the constitution affecting federal jurisdiction in criminal cases are the following:

> (Art. I, Sec. 3) 6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose they shall be on oath or affirmation. When the President of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.
>
> 7. Judgment, in cases of impeachment, shall not extend further than to removal from office and disqualification to hold and enjoy any office of power, trust or profit, under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.
>
> (Art. I, Sec. 8). The Congress shall have power . . .
>
> 17. To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of Congress, become the seat of government of the United States; and to exercise like authority over all places purchased by the consent of the legislature of the state, in which the same shall be, for

the erection of forts, magazines, arsenals, dockyards, and other needful buildings.

(Art. I, Sec. 9.) No bill of attainder or *ex post facto* law shall be passed.

(Art. III, Sec. 2) 3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trials shall be held in the state where the said crimes shall have been committed; but when not committed within any state the trial shall be at such place or places as the Congress may by law have directed.

(Art. III, Sec. 3) 1. Treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.

(Art. IV, Sec. 2) 2. A person charged, in any state, with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

(Amendments Art. V.) No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

(Id. Art. VI.) In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining wit-

nesses in his favor; and to have the assistance of counsel for his defence.

(Id. Art. VIII.) Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

It will be observed that the Constitution, so far as it regulates criminal procedure, closely follows the lines of the Common Law.

Within the District of Columbia, the United States has sole and exclusive jurisdiction, and there all law, criminal as well as civil, is of federal enactment. So, within military reservations, forts and other places owned by the United States and upon American vessels on the high seas the federal government has, generally, civil and criminal jurisdiction. But within the states, the scope of the criminal law administered by the federal courts is narrow and closely limited. The subjects to which federal authority is constitutionally restricted are of national import and affect the people at the points where they come into contact with federal institutions. It is the law of the states, and not of the nation, that is in constant touch with the common life of all the people; it is ever present, regulating the acts of every individual, in so far as such acts affect others or bear relation to the community at large, and its protecting and restraining power guards the peace and order of society. Hence the great volume of crime in the United States consists of offenses against state law. Some offenses, indeed, that are made criminal by federal law are also included within those prohibited by state law, the offender being thus liable to trial and conviction in the courts of both the nation and the state.

The relation to be borne by the laws of the states to those of the federal government was anticipated at the time of the adoption of the Constitution by James Madison, in the following language:

"The powers delegated by the proposed constitution to the federal government are few and defined; those which are to remain in the state government are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce, with which last the power of taxation will for the most part be connected. The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement and prosperity of the state."

This anticipation has been substantially realized; but it will be observed that President Madison, in forecasting the scope of the federal government, specified foreign commerce as one of the principal objects within its power of control and inter-state commerce was not even mentioned; probably it was not then imagined that *internal* commerce was destined greatly to transcend foreign commerce in its magnitude and importance. The Constitution, however, expressly empowers Congress "to regulate commerce with foreign nations and among the several states." This power, so far as it affected inter-state commerce, remained largely in abeyance until two statutes were enacted by Congress, one known as the Inter-State Commerce Law, passed in 1887, and the other as the Anti-Trust Law, passed in 1890. These acts as penal statutes will receive detailed consideration in the next chapter. They have exerted a drastic influence upon commercial trade, and indeed have affected, directly or indirectly, all business enterprises throughout the Union. They have so extended federal control over interests which were formerly subject to state legislation that President Madison's interpretation of the Constitution as to the relative extent of state and federal power, may now require modification; it is at least doubtful whether it can still be said that the powers delegated by the Constitution to the federal government are "exercised principally on external objects."

CHAPTER II

CRIMINAL LAW WITHIN FEDERAL JURISDICTION

FEDERAL COURTS

THE Constitution provides that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish;" and, among the powers of Congress, specified in Article I, Section 8, of the Constitution, is power "to constitute tribunals inferior to the Supreme Court." By acts of Congress, passed pursuant to these constitutional provisions, the United States is now divided into nine judicial circuits, each circuit embracing from three to twelve states. Each circuit is subdivided into judicial districts. A judicial district comprises in no case more than a single state and many of the larger and more populous states are divided into several judicial districts. There are in all the states seventy-seven judicial districts, in each of which is established a United States district court presided over by one or more judges appointed by federal authority. In each of the nine circuits are one United States circuit court and one circuit court of appeals, having two, three or four circuit judges, and presided over by one of the justices of the Supreme Court of the United States. Throughout the states, the circuit courts hold periodical sessions within each of the districts included in the circuit, so that every district has both a circuit and a district court.

Jurisdiction of Federal Courts

The criminal jurisdiction of the circuit courts and the district courts is limited territorially to crimes against federal statutes committed within the circuit or district to which each court respectively belongs, except that crimes committed on the high seas or in places outside state jurisdiction may be prosecuted in the judicial district or circuit where the offender is apprehended or first brought. There are certain criminal cases defined by statute in which the circuit courts and district courts have concurrent jurisdiction; but in all other criminal cases, including the trial of capital offenses (except

as otherwise provided by law), the circuit courts have exclusive jurisdiction. Appeals from both courts can be carried to the circuit court of appeals but no further, except that appeals in capital cases can be taken directly to the Supreme Court.

The Supreme Court of the United States, with a chief justice and eight associate justices, has original jurisdiction in all cases affecting ambassadors or other public ministers and consuls and in those in which a state is a party. In all the other cases specified in the Constitution its jurisdiction is appellate; appeals may be taken to it from the circuit and district courts in certain civil cases, but in criminal cases the only appeal allowed to the Supreme Court is the instance (just mentioned) of capital cases. Appeals to the Supreme Court may also be had from state courts in cases, both civil and criminal, involving the construction or application of the federal Constitution or of laws of the United States.

Classes of Federal Criminal Laws

The criminal laws enacted by Congress may be divided into two separate classes; first, those that relate to offenses committed only in places under the exclusive jurisdiction of the United States or upon the high seas or within the admiralty or maritime jurisdiction of the United States; second, those that are in force throughout all the states, as well as in all other places over which the federal authority extends. For convenience of designation merely, the first may be called "local," and the other "general," legislation.

I. Criminal Legislation, Dependent on Locality

The land comprised within the present District of Columbia was ceded to the United States for the seat of government by the state of Maryland, and is of course under the sole jurisdiction of the United States. There are many other places, situated within the states, which have been acquired by the United States for federal uses, such as sites for navy yards, forts, arsenals, custom houses, post offices, court houses, prisons. The United States has exclusive jurisdiction over crimes committed in all these places, provided the respective states in which they are situated have ceded such jurisdiction to the general government; but the United States cannot acquire exclusive jurisdiction over any place within the boundaries of a state except by consent or cession by the state. Such cession has uniformly been granted by the states and its effect is the surrender and transference of all state criminal jurisdiction over the places in question to the

federal government. The mere acquisition by the United States, through purchase, of land within a state, for government uses, creates no federal jurisdiction over such land; but when the state consents to the purchase the state courts no longer retain the power to try or to punish offenders for any crime committed upon such land, the federal courts having sole and exclusive jurisdiction.

The United States has, of course exclusive jurisdiction over its territories and insular possessions, where it has established courts under federal authority. But when a territory is admitted to the Union as a state, the United States surrenders to such state, within the state boundaries, jurisdiction of the same kind and to the same extent as that belonging to the sister states.

The United States has criminal jurisdiction, exclusive of the states, also upon the high seas. But this jurisdiction is confined to piracies and felonies and to offenses committed on American ships in violation of federal statutes. Its potential jurisdiction extends to all offenses against the law of nations; but to exercise this jurisdiction, Congress must enact statutes providing the penalties for such offenses and designating the tribunal for the trial of them.

In all the places (mentioned above) which have been purchased by the United States with the consent of, or jurisdiction over which has been ceded by, the states where they are situated, in its territories and insular possessions and upon the high seas, the United States has sole jurisdiction over all crimes committed; and this jurisdiction is exclusive, in the sense that the states have no power to take any action, or to exercise any authority, judicial, executive or legislative, touching a crime committed in any of those places. Moreover, the criminal jurisdiction of the United States differs from that of the states in one very important particular: in most of the states, an offense, even though not included in any state penal statute, can still be criminally prosecuted and punished, provided the offense is criminal at Common Law. In the federal courts, on the other hand, the Common Law of crimes is not in force, and crimes are purely statutory. It follows that a crime committed in a place that is under the exclusive jurisdiction of the United States wholly escapes prosecution, unless there is an act of Congress which (1) defines that crime, (2) fixes the penalty attached to it, and (3) declares the tribunal before which the trial shall be had.

This situation demanded from Congress the adoption of a comprehensive system of penal law broad enough and minute enough to protect the places within the exclusive jurisdiction of the United

States against every crime known to both the statutory and the Common Law of the country. This duty Congress surprisingly failed to meet. Very early in the history of the United States, in the year 1790, a "Crimes Act" was passed; it related mainly to offenses on the high seas, to treason, to offenses against neutrality and against the coinage, but it was silent upon most of the common offenses which make up the great volume of crime. The meagreness of this act is explained by the belief, then prevalent, that the federal courts possessed a Common Law jurisdiction; it was generally supposed that an offense which was criminal at Common Law could be prosecuted and punished in the federal court, in the absence of a specific act of Congress. This opinion was held to be erroneous by the Supreme Court in the case of *United States v. Hudson* (7 *Cranch Rep.* 32), which expressly held that the "exercise of criminal jurisdiction in Common Law cases" is not within the powers of the federal courts, and that "the legislative authority of the union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense."

United States v. Hudson was decided in the year 1812; it placed the federal criminal law in a deplorable plight. There were numberless crimes which could be committed with absolute impunity in the large number of places located in all parts of the country that were under the exclusive jurisdiction of the United States; crimes that could not be prosecuted in the state courts, because the states had ceded jurisdiction of those places to the central government, nor in the federal courts, because Congress had failed to pass the requisite penal statutes. The remedy lay in the speedy enactment by Congress of a comprehensive criminal code. Such a code, it would appear, was drafted by Justice Story of the Supreme Court and approved by all the other judges of that court, but it was never adopted by Congress. This anomalous and fairly anarchical situation, relieved only by special penal laws enacted by Congress from time to time, continued until the year 1825. The second "Crimes Act" of the United States was then adopted; it consisted of twenty-six additional sections, which were mainly a codification, with some enlargement, of the previous legislation of Congress.

Both these Crimes Acts were defective in that they left many crimes unmentioned; indeed, it cannot be said that they pretended to present a comprehensive enumeration of all crimes, in the form of a complete penal code. But the act of 1825 attempted to cure this defect by a new section which practically adopted the penal laws of

each state by making them applicable to offenses committed in places under federal jurisdiction situated within the state. The third section of the Act of 1825 is as follows:

"If any offence shall be committed in any of the places aforesaid" (referring to forts and other public places the sites of which had been ceded to the United States), "the punishment of which offence is not specially provided for by any law of the United States, such offence shall, upon conviction in any court of the United States having cognizance thereof, be liable to and receive the same punishment as the laws of the state in which such dock yard, navy yard, arsenal, armory or magazine or other place ceded as aforesaid is situated provide for the like offence when committed within the body of any county of such state."

This ingenious substitute for a national penal code was soon proved to contain some very troublesome and unforeseen defects. One of the earliest decisions upon the construction and effect of the section was in *United States v. Paul* (6 *Peters R.* 141). Chief Justice Marshall there held that the section "is to be limited to the laws of the several states in force at the time of its enactment." The penal laws of the states are constantly undergoing revision, amendment and repeal, new laws adapted to changed conditions taking the place of old laws repealed. Congress may have the power to adopt as its own an existing state law, but it obviously has not power to adopt in advance any amendment the state may hereafter make to that law, nor to delegate to the state the power to legislate for Congress in adopting a new substituted law in place of the existing law. The result followed that the federal courts might be compelled to punish crimes, if at all, by applying to them some obsolete statute which had long before been repealed by the state. It can hardly be believed that Congress originally intended that the act should involve the sentencing of an offender to punishment under a statute which had been repealed and was therefore non-existent. The Court said, in *United States v. Barney* (5 *Blatch R.* 294), "I should hesitate long, before deciding that Congress intended that the courts should resort to the repealed laws of any state as a source of criminal jurisdiction."

The decision in *United States v. Paul* and subsequent cases following its authority made the third section of the Act of 1825 inapplicable in all states admitted to the Union after its enactment, because the laws of such states were obviously not in force when the act was passed. Neither was the act applicable to any places ceded

to the United States after its enactment. The law remained in this situation for a period of forty-one years, from 1825 to 1866. During this period, twelve new states were admitted to the Union and the number of places ceded to the United States and coming within its exclusive jurisdiction all over the country was very largely increased. And yet, during all this period, no crime committed in any of the places within federal jurisdiction, which were located within the twelve new states or which were purchased or acquired in any state within that period, could be punished by either state or federal authority, except the comparatively few crimes expressly covered by the acts of Congress.

In 1866 an act was passed by Congress which substantially re-enacted the third section of the Act of 1825, with two material additions: its provisions extended to all places which "have been or shall hereafter be" ceded to the United States, and expressly declared that the punishments provided by the state laws then in force should continue to be applied, notwithstanding such state laws might afterward be repealed by the state. This act adopted the state laws as they then existed, including the twelve new states admitted since 1825, and brought the situation fairly up to the date of the act. It also provided for places that might thereafter be ceded to the United States and come under its exclusive jurisdiction, but it did not extend to states that might be admitted to the Union after the passage of the act. But the provisions for the future which continued the application of a state statute after its amendment or repeal by the state, was prompted by the impossibility of Congress adopting in advance any change the state might thereafter make in its penal statutes. It was thought better that an offender should be punished under an extinct law than that he should not be punished at all, and this method was adopted in order to secure, in the future, punishment of all crimes, notwithstanding the changes in the criminal law constantly going on in the states, through revision, amendment and repeal. Perhaps no better method could be devised, if the plan of a national penal code is to be rejected. Still, public sentiment will always revolt at a sentence of condemnation based upon a statute that has no legal existence. To avoid this result, the act of Congress should be frequently re-enacted and so keep pace with the progress of state penal legislation.

The Act of 1866 has been substantially re-enacted, in the Revised Statutes of the United States, in an act passed in 1898 and in the present penal code of the laws of the United States adopted in 1909.

The relation borne by federal jurisprudence to the penal laws of the several states therefore remains the same now as it was when originally created by the third section of the Act of 1825.

A FEDERAL PENAL CODE

For reasons which have already been made apparent, urgent demands have been made upon Congress, during the last hundred years, for the adoption of a national penal code which should be wholly independent of state laws. Congress has always manifested reluctance to take this step. The reluctance may be accounted for partly by consideration of the fundamental plan of our government, according to which the maintenance of public order and the punishment of crime were peculiarly matters of state supervision and control. The body of criminal laws in a state represents the stage of civilization reached by the people of the state and reflects the prevailing moral sentiments of the community. It is the merest truism that a criminal law cannot be enforced and has no value unless it is approved and supported by the moral sense of the people. There is force in the argument, that each community (for a people scattered over so large a country as the United States) can be best governed by the penal laws of its own making rather than by a single and unvarying national code of criminal law. When we consider the different habits and usages prevailing among the widely separated communities that compose our population of over eighty millions living in different climates from Alaska to Florida, some states distant thousands of miles from other states; when we consider that the central government has exclusive dominion over places situated within every one of these states and that a national penal code, if made independent of state law, would have to cover not only every grave crime but every petty misdemeanor condemned by some city ordinance and would have to be made uniform in its application throughout all the vast dominions of the United States, we can well understand that Congress should stand aghast before so colossal an undertaking. It may be matter of serious doubt whether the construction of such a universal code is feasible, and a matter of more serious doubt whether the present system, crude as it may seem, does not produce more satisfactory results than could be attained by any possible national code.

Several such general codes, however, have been prepared and submitted to Congress but they have all failed of passage. Reference has been made to the code prepared by Joseph Story when Justice of

the Supreme Court about the year 1818. Ten years later, a very comprehensive federal code of criminal law was prepared by Edward Livingston, who was then a member from Louisiana of the House of Representatives. Probably, no person then living in the United States was as competent as he was to perform this task. Edward Livingston was the earliest, and remains one of the foremost, among the penologists this country has produced. His most celebrated work was the penal code which he prepared for the state of Louisiana, with an accompanying volume commenting upon its provisions. The whole work was a masterly presentation and discussion of the principles and aims of criminal law and of the methods that should control the public treatment of crime and of criminals. It commanded wide attention both in this country and in Europe and is still accepted as a really monumental work. Edward Livingston was in advance of his time in advocating many ideas and methods, then novel, which have since been tested by experience and have now secured general acceptance. He became successively United States Senator from Louisiana, a member of the cabinet of President Andrew Jackson and United States Minister to France. The code that Edward Livingston prepared for the United States was most comprehensive: it comprised four parts, which were entitled, A Code of Crimes and Punishments, A Code of Procedure in Criminal Cases, A Code of Prison Discipline and A Book of Definitions. This series of codes was introduced in the House of Representatives in 1828; and when its author became a member of the Senate in 1831, he took measures to press its adoption but, upon his transference soon after to the Cabinet, the matter was postponed and finally abandoned.

The latest effort to secure a national code originated in an act of Congress in 1897 appointing a commission "to revise and codify the criminal and penal laws of the United States." The commission, impressed with the defects and inadequacy of the then existing criminal laws of the United States, decided to ignore them and to prepare an entirely new code based upon models of the most modern and advanced systems. Their first report was accordingly submitted to Congress in 1901 but it failed to receive consideration from the House. In 1906, a later report was submitted and referred to a joint committee of the Senate and the House. This committee then prepared a code of the existing laws of the United States, omitting redundant and obsolete enactments, harmonizing and amending the laws by reconciling contradictions, correcting omissions and imperfections in the text, and making such substantive changes in the law as they

thought necessary and advisable. The code so prepared was finally adopted and became a statute of the United States in the year 1909.

There are some important features of this new code of 1909 that deserve mention. The specific designation of an offense, in the section defining it, as a *felony*, or a *misdemeanor*, has been omitted and, instead, a section has been inserted which declares that "all offences which may be punished by death, or by imprisonment for a term exceeding one year, shall be deemed felonies. All other offences shall be deemed misdemeanors." In prescribing the punishment of an offense by imprisonment, the maximum term of imprisonment only is mentioned; the omission to fix any minimum enlarges the discretion of the court. Cases often arise where mitigating circumstances exist in so strong a degree that the presiding judge may be convinced that a lighter sentence than the minimum fixed by statute ought to be imposed; the proper administration of justice is more apt to be hampered by a statutory minimum than by a maximum limitation. The code makes accessories before the fact liable as principals, thus avoiding the Common Law rule that an accessory could not be tried before conviction of the principal, unless both were tried together.

The death penalty is preserved in only three cases: treason, murder and rape. But in the case of treason, there is the alternative punishment of imprisonment for not less than five years and a fine not less than $10,000. (This is one of the few instances in which a minimum limit is set to the penalty.) In cases of murder and of rape, the jury may qualify their verdict by adding thereto "without capital punishment:" the person convicted shall thereupon be sentenced to imprisonment for life.

The traditional sentence to imprisonment "at hard labor" has been modified by omitting the words "at hard labor." There are two reasons for this omission, one theoretical and the other practical. Under modern theories, hard labor in prisons should be used as a measure of discipline and reformation and not as a part of the punishment; hence it should not be included in the sentence. The practical reason is that the hostility of labor unions to prison labor has controlled state legislation to such an extent that in some of the states "hard labor" is no longer found in the prisons. The central government has not established prisons of its own having sufficient capacity to receive all federal prisoners. Outside the District of Columbia, the United States has two national penitentiaries under exclusive federal control, one at Atlanta, Georgia, and the other at Fort Leavenworth, Kansas. To these penitentiaries, which are of

quite recent construction, convicts are committed from the federal courts. Before their establishment, federal convicts were sent to various state and county prisons, under contracts between the United States and the various states or counties which owned and operated these prisons. By the terms of such contracts, federal convicts were confined in the state and county prisons, subject to the same control and discipline as applied to the state prisoners confined there, the United States paying a stipulated amount for their support and custody. The same arrangement now exists and federal prisoners are found in penal institutions under state and local control at scattered points throughout the Union. If an offender were sentenced to "imprisonment at hard labor" by a federal court to a state prison where hard labor (within the Common Law definition of the term) did not exist, he might be advised to apply for his discharge upon a writ of habeas corpus.

The new federal code has no provision for an indeterminate sentence or for discharge on parole. If the federal prisons had capacity to receive and did receive all the federal convicts, there would arise no legal difficulty in applying to them the indeterminate sentence and all the rules regarding parole as fully as these measures have been adopted by the states. As the situation now exists, federal prisoners committed to state institutions are placed at a disadvantage when compared with fellow prisoners convicted for the same offense by state courts; the latter have the inestimable privileges of the indeterminate sentence and release on parole from which the federal prisoners are debarred. The following extract from the Attorney General's report for the year 1894 sets out forcibly the remedy demanded. After referring to the reformatory methods of treatment prevailing in state institutions, the report proceeds:

"In these benefits and privileges juvenile convicts who are sent from United States courts have no share. Their sentences are fixed, and no matter how perfect their conduct, they can receive only such commutation of sentence as is prescribed for prisoners sentenced to prisons or penitentiaries. They are thus deprived, in large measure, of those incentives which induce others to work for parole, and the discrimination thus necessarily made results not infrequently to the absolute prejudice of the federal prisoner, causing him to regard his treatment as a species of injustice, and encouraging him in insubordination and discontent. To remedy this condition federal prisoners should be placed on the same footing in these institutions as the other inmates, and the statutes should be so modified as to

make applicable to federal prisoners sentenced to reformatories the indeterminate sentence and parole laws which govern the state prisoners therein confined."

ADMIRALTY AND MARITIME JURISDICTION

Article III, Section 2, of the Constitution declares that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." Admiralty and maritime jurisdiction extends, in the United States at least, to all the navigable waters within, and along the shores of, the country; it embraces all the great lakes, navigable rivers, bays, harbors, inlets from the sea, whether included within the boundaries of a single state or of several states. This jurisdiction includes cases criminal as well as civil; and Congress is doubtless vested with such power of criminal legislation as pertains to admiralty and maritime jurisdiction regarding crimes committed on navigable waters located within the borders of a state. A number of such laws have been enacted (Chapter 12 of the new penal code of the United States), making it criminal to do certain acts "on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States;" for example, when the master of a vessel inflicts cruel and unusual punishment upon any of the crew, or when any member of the crew conspires with others to make a revolt or mutiny on board the vessel, or when any person steals goods belonging to a vessel wrecked in any "place within the admiralty and maritime jurisdiction of the United States." These statutes would seem to be applicable to the designated offenses when committed upon a navigable river, for instance, wholly included within a state. They do not, however, divest the state of a concurrent jurisdiction since they are contained in the recent code of the penal laws of the United States, which provides (§326) that nothing therein contained "shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof."

These laws, however, are in derogation of the general scheme of our government which leaves to the states the punishment of crimes committed within their borders. This becomes evident from Chapter 11 of the penal code just mentioned which is entitled "Offences within the admiralty and maritime and the territorial jurisdiction of the United States." The first section of this chapter declares: "The crimes and offences defined in this chapter shall be punished as herein prescribed: *First.* When committed upon the high seas,

or on any other waters within the admiralty and maritime jurisdiction of the United States *and out of the jurisdiction of any particular state,* or when committed within the admiralty and maritime jurisdiction of the United States and *out of the jurisdiction of any particular state* on board any vessel belonging in whole or in part to the United States or any citizen thereof or to any corporation created by or under the laws of the United States or of any state, territory or district thereof." The clause printed above in italics excludes from federal cognizance the crimes specified in the chapter, when committed on waters that are *within* the jurisdiction of a state, and leaves such crimes to be dealt with by the laws of the state. The specific crimes mentioned in the chapter are murder and manslaughter, assaults, rape, seduction, destruction of human life by negligence of the captain or other person employed on any vessel, mayhem, robbery, arson, larceny and receiving stolen goods. As the laws contained in Chapter 12 of the penal code (mentioned in the preceding paragraph), are part of the same act with said Chapter 11 and said Section 326, it may be held that the words "out of the jurisdiction of any particular state" must by implication be read into those laws, thus limiting the broad language used. This view was taken in the somewhat parallel case of *Ex parte Ballinger,* 88 *Federal Reporter* 781.

The disposition of the Supreme Court to preserve unimpaired state jurisdiction over crimes committed on navigable waters within the state is evidenced in the leading case of *United States v. Bevans* (3 *Wharton's Rep.* 336). A marine in the service of the United States murdered a cook's mate in the same service on board a United States ship of war lying at anchor in Boston harbor. The murderer was indicted and brought to trial in the federal court of that circuit. It was proved that the water at the point where the ship was lying was within the state of Massachusetts, but it was claimed by the prosecution that the ship of war was a *place* under the sole and exclusive jurisdiction of the United States and that the federal court had jurisdiction under an act of Congress which declared that if any person should commit the crime of wilful murder "within any fort, arsenal, dock yard, magazine or in any other place, or district of country, under the sole and exclusive jurisdiction of the United States" he should suffer death. But the court held that the word "place" as used in that statute had a territorial meaning and did not apply to a vessel lying in the harbor. The court, by Chief Justice Marshall, used the following language:

"It is not questioned, that whatever may be necessary to the

full and unlimited existence of admiralty and maritime jurisdiction is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still, the general jurisdiction over the place, subject to the grant of power, adheres to the territory, as a portion of sovereignty not yet given away."

This case was decided in the year 1818 and has ever since been cited as a leading authority; it is believed that the acts of Congress passed since that date have not materially altered the situation as it then existed. The case is a very strong one in support of state jurisdiction over crimes committed upon its own navigable waters; for it would seem that if the United States had anywhere jurisdiction, absolute and exclusive of the states, it would be on board a ship of war belonging to the United States. In view of the language used by Judge Marshall, quoted above, it is extremely doubtful whether it is within the federal power wholly to exclude the states from criminal jurisdiction over navigable waters within the states. There appears to be at most a dual jurisdiction over such waters: one, an admiralty and maritime jurisdiction vested in the general government; the other, a territorial jurisdiction vested in the state and incident to its sovereignty over the waters as a part of its domain. This latter jurisdiction, if it can exist coincidently with the admiralty and maritime jurisdiction, has not been ceded to the federal government and cannot be extinguished by any act of that government.

II. General Criminal Legislation, Applicable Throughout the United States

The criminal laws of the United States thus far considered are local, in the sense that they touch offenses committed in certain places only, the federal jurisdiction arising out of a special relation borne by the general government to those places. The other class of federal criminal legislation (now to be considered) is general, having universal application throughout all the states and in all other places within the sovereignty of the United States. These are the laws necessary to enforce obedience to the general acts of Congress and to enable the central government to exercise the powers and perform the duties committed to it by the Constitution. They occupy the first ten (of the total fifteen) chapters of the new penal code, while the last two chapters relate to both classes of federal legislation. The first ten chapters relate to offenses against the existence of the

government, against neutrality, against the elective franchise and civil rights of citizens, against the operations of the government, relating to official duties, against public justice, against the currency, coinage and securities of the United States, against the postal service, against foreign and inter-state commerce, the slave trade and peonage. The penal code must not be taken, however, to include all the penal laws of the United States. There are many acts of Congress relating to matters of civil law but embodying penal provisions for their violation. For example, Chapter 9 of the penal code is entitled "offences against foreign and inter-state commerce;" it omits many sections contained in what are known as the Inter-State Commerce Laws which declare acts done in violation of their provisions to be misdemeanors punishable by fine and imprisonment.

The power of Congress to enact legislation of this second class differs radically from the power to enact laws of the first or local class. In "local" legislation, Congress has exclusive and absolute jurisdiction and has the power, inherent in every sovereign nation, to enact any law it may deem expedient, subject only to such restrictions as may be imposed in the Constitution of the United States. But Congress can pass no law of the second class (designated herein as "general" legislation) unless the power to do so is given by the Constitution either expressly or by necessary implication. The powers of Congress in this regard are closely defined and limited by the Constitution. The same difference exists between the states on the one hand, and the United States (in regard to the kind of legislation now under consideration), on the other hand; the states have inherent power to enact any law they may judge fitting, provided it does not conflict with the state or federal constitutions or with laws or treaties made by the central government: the United States has no such inherent power and Congress must derive from the terms of the Constitution affirmative authority to pass a law on any subject not comprised within its exclusive or "local" jurisdiction. Another point of difference by which state jurisdiction over crimes is broadened is the fact (already repeatedly referred to) that the Common Law prevails in most of the states; while, in the federal courts, the only criminal law is purely statutory.

SEPARATION BETWEEN STATE AND FEDERAL CRIMINAL JURISDICTION

The stability of a dual form of government, as it exists in the United States, depends, of course, upon preserving the equilibrium between the separate sovereignties and the avoidance of encroach-

ment by either upon the constitutional domain of the other. Usurpation is more possible on the side of the central government than on the side of the states because the United States commands far greater force than any of the component states to compel obedience to its decrees. But so far as the criminal law at least is concerned, the United States has shown no disposition to trespass upon the jurisdiction of the states. On the contrary, Congress has failed to exercise, to their full extent, the powers which are unquestionably given it by the Constitution to entrench upon state laws. In many cases where Congress had the constitutional power to take entire and exclusive cognizance of a subject, it has refused to declare its legislation to be exclusive, thus leaving to the states concurrent jurisdiction. Congress has refused (as already shown) to enact a national penal code that is independent of state law, and, indeed, has adopted the laws of the state for the great body of crime not covered by federal statutes; and even as to those statutes, it has been careful to declare that nothing contained in them shall be held to take away or impair the jurisdiction of state courts under the state laws. The United States has power to take cognizance of criminal infractions of its treaties with foreign nations, but, as shown in the preceding chapter, it has chosen to leave those within state jurisdiction.

If we turn from the action of Congress to the decision of the federal courts, we shall find in a still more marked degree the determination manifested to defend the jurisdiction of the states from federal infringement. The case of *United States v. Bevans* (just referred to) was one in which, it may seem to some, the Supreme Court almost strained the law in holding that the crime fell within state jurisdiction. Another instructive and leading case is that of *Tennessee v. Davis* (100 *U. S. Reports* 257). The defendant Davis was a United States collector of internal revenue in the state of Tennessee, charged with the duty of seizing illicit distilleries. While engaged in seizing such a distillery he was resisted and fired upon by a body of armed men; returning the fire in self-defense, he shot and killed one of the attacking party. For this act, he was indicted for murder in the state court. The case was removed to the federal court of the district; and a motion was then made on behalf of the state to remand the case to the state court on the ground that it alone had jurisdiction. The Supreme Court held that, as the defendant committed the act in discharge of his duty as an officer of the United States and in enforcing the authority conferred upon him by

the laws of the United States, he could be held responsible for his act only before courts of the United States; that if a federal officer, thus acting, could be brought to trial in a state court for an alleged offense against the law of the state, yet warranted by federal authority, the operations of the central government might be arrested by the action of the state court. The jurisdiction of the federal court was upheld on the ground that the power of the United States to protect its officers in performing their duties was essential to the existence of the central government. Two of the Supreme Court justices, nevertheless, dissented with great earnestness from the decision, holding that the crime of murder committed on the territory of a state was an offense against the law of the state, and that the offender, whether a federal officer or not, was, under the Constitution, subject to the exclusive jurisdiction of the state courts.

One of these dissenting justices, Mr. Justice Field, by a singular coincidence, was tragically connected personally with a later case which arose in the Supreme Court involving much the same question. This later case (*In re Neagle*, 135, *U. S. Reports* 1) grew out of the following state of facts. One Terry, a resident of California, was interested in an action in a federal circuit court, Justice Field presiding, in which judgment had been rendered adverse to his interest. Terry, feeling greatly aggrieved by the judgment, conceived a violent hatred of the presiding justice and publicly declared his intention to kill Justice Field if he came to California. Soon afterward it became the duty of Justice Field to proceed to California to preside again over the circuit court of that circuit. Terry's threats coming to the knowledge of the federal authorities, the United States marshal in California directed Neagle, a deputy marshal, to attend Justice Field and protect him from attack. While the justice and Neagle were on the journey to San Francisco, and within the state of California, Terry made a murderous assault upon Justice Field, and Neagle, in defending the life of the justice, shot and killed Terry. Neagle was then arrested by a state sheriff on the charge of murder under the laws of California. Being brought before the federal circuit court of the district upon writ of habeas corpus, the court discharged him from arrest, upon the ground that Neagle, acting in discharge of his duty as an officer of the United States, was justified in defending Justice Field and could not be held to answer in a state court to a charge of murder based upon an act for which he had the authority of the laws of the United States. This decision was affirmed on appeal by the Supreme Court, but by a divided court.

The fact that in both these cases, where the decision seems so obviously just, there were long and earnest dissenting opinions, shows with what watchful and jealous care the Supreme Court guards the criminal jurisdiction of the state courts.

One of the latest cases in the Supreme Court drawing a line of demarcation between federal and state criminal jurisdiction is *Keller v. United States* (213 *U. S. Reports* 138), which held unconstitutional an act of Congress making it a felony to harbor alien prostitutes; on the ground that the regulation of that offense was within the police power reserved to the states and not within any power delegated to Congress by the Constitution.

THE ANTI-TRUST LAW

In federal legislation of the second or "general" class now under consideration, the two acts of Congress (referred to in the first chapter) known as the Inter-State Commerce Act and the Anti-Trust (or Sherman) Law are by far the most important. They invaded a field which had been previously left to the jurisdiction and control of the states. These two acts, passed in 1887 and 1890, have greatly increased the business of the federal courts on the criminal side. They were enacted at a time when the public mind was inflamed by hostility to corporations and especially railroad corporations. This hostility was by no means groundless. Corporations could be created, under general laws, with the utmost facility, and they were allowed to conduct their business with a free hand, not to say with a high hand. They were subjected in but slight degree to governmental regulation or supervision, and the visitatorial power over them, vested in the state, was laxly exercised. Commanding boundless resources of wealth and impelled by fierce competition, the corporations were prone to act with the arrogance of irresponsible power in the struggle to expand their business; they were often pitiless in crushing individual competitors; they made discriminations in rates which favored large dealers and ruined small ones; they were arbitrary and sometimes lawless in their regulations and their treatment of the public. They tended to monopolize the business of the country and it was claimed that these monopolies oppressed the people: it was difficult for a private citizen to enforce his legal rights in a contest with a powerful corporation and there were few private citizens who had the means and the courage to enter upon such a contest. There was thus widely developed among the people a spirit of bitter animosity and revolt against corporations and monopolies and particu-

larly against what are known as "public service" corporations; there arose an insistent and angry popular demand that the corporations should be curbed and humbled and their lawless methods stopped. It was in response to this imperative demand that Congress passed the inter-state commerce and anti-trust laws.

But the power of Congress to intervene at all in this contest was limited by the dual form of our government. The corporations were created under state laws and subject to state jurisdiction. Commercial and mercantile business carried on within the limits of a state is under state, and not federal, cognizance. But the business of the corporations was rarely confined within the limits of a single state, and in so far as it extended into other states it became inter-state commerce. The Federal Constitution empowers Congress to pass laws "to regulate commerce among the several states." Under this clause of the Constitution, the laws under consideration were passed, but they are constitutionally limited in their operation to corporations and individuals in so far only as they are engaged in trade and commerce between the states or with foreign countries.

The provisions of the anti-trust act, so far as it bears relation to the criminal law, are contained in the first three sections, which are as follows:

> Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce

> in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such territory or territories and any state or states, or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The effect of the act is manifestly dependent upon the meaning to be attributed to the phrase "restraint of trade or commerce." The expression had a well-defined meaning at Common Law and, by a long line of decisions in the state courts, the distinction had been firmly established between contracts restraining trade that were lawful and those that were unlawful. If the contractor agreed with a competitor to abandon his business or trade and not to engage for the future in like business or trade, the contract was held to be unlawful as being in restraint of trade. But if the contractor sold out his business with its equipment and, as an incident to the sale and to increase the purchase price, further agreed not to compete with the purchaser by entering again upon the same kind of business for a fixed period of time and within a limited territory, the contract was not necessarily illegal; if the period of time or extent of the territory within which the contractor was restrained from resuming his trade or business were not unreasonably large and the contract viewing all its terms appeared to have been made in good faith it was sustained. The test of validity, established at Common Law and throughout the states of the Union, was in the reasonable or the unreasonable character of the restrictions embodied in the contract.

In the case of *United States v. Trans-Missouri Freight Association* (166 *U. S. Rep.* 290), the meaning of the phrase "every contract in restraint of trade," as used in the anti-trust law, received exhaustive discussion. It was held that the language must receive strict construction and that every contract which operated in restraint of trade or commerce among the states, whether reasonable or unreasonable, was made illegal. This decision was supported by five of the nine justices of the Supreme Court, but was strenuously dissented

from by the other four. It was earnestly contended, in opposition, that the Common Law was always resorted to in the interpretation of statutes, and that where a statutory phrase was used (e. g., contract in restraint of trade) which had received at Common Law a clearly defined meaning, such meaning should be adopted in construing the statute. Stress was laid also on the title of the act which prohibited only "*unlawful* restraints." But the prevailing decision held that the "unlawful" restraints mentioned in the title meant the restraints which were made unlawful by the body of the act; that the term "contracts in restraint of trade" included, at Common Law, those that were reasonable and lawful and those that were unreasonable and unlawful; and the act under consideration, declaring illegal *every* contract in restraint of trade, necessarily included both reasonable and unreasonable contracts. On the other hand, it was claimed, and many authorities cited to sustain the claim, that at Common Law the term was applied only to unlawful contracts; that if a contract charged to be in restraint of trade was held at Common Law to be a lawful contract it was because it was held not to be in restraint of trade; and that, therefore, the term "contract in restraint of trade" always meant at Common Law an unreasonable and illegal contract.

If the word "unlawful" which occurs in the title had been inserted in the body of the act also, so that the act had declared illegal "every contract in unlawful restraint of trade," this discussion and the very serious consequences involved in the decision would have been avoided. The question arose again in *Northern Securities Co. v. United States* (193 *U. S. Rep.* 197), when Mr. Justice Brewer, who had concurred in the prevailing opinion in the *Trans-Missouri Freight* case and in subsequent cases following its authority, declared that in his opinion those cases were rightly decided for the reason that the contracts involved in them were in *unreasonable* restraint of trade. The anti-trust act, he further declared "as appears from its title, was leveled at only 'unlawful restraints and monopolies.' Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at Common Law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable and against public policy. Whenever a departure from Common Law rules and definitions is claimed, the purpose to make the departure should be clearly shown.

Such a purpose does not appear and such a departure was not intended."

If the *Trans-Missouri Freight* case (and the subsequent dependent cases) can be placed on the ground that the contracts passed upon were in unreasonable and hence unlawful restraint of trade (as asserted by Mr. Justice Brewer) then the position taken in the prevailing opinion—that the act embraced every contract, whether reasonable or unreasonable—becomes merely *obiter*, with the majority of the court opposing it. It may now be fairly claimed that it is an open question, still undecided, whether the act condemns any contract other than one in unreasonable restraint of trade and whether it was intended by Congress to go any further than to adopt the rule of the Common Law.

It can hardly be denied that the anti-trust law is an extremely crude piece of legislation. Its condemnation of trusts and monopolies is expressed in terms too comprehensive and sweeping. Besides "*every*" contract, it applies to *every* person, including individuals as well as corporations, and makes it a criminal act to attempt to monopolize "*any part*" of inter-state or foreign commerce or trade. If subjected to a strict and literal interpretation (and the decisions of the Supreme Court certainly point to such an interpretation) the act is calculated to paralyze all inter-state and foreign trade and commerce. Every person engaged in such trade *does* "monopolize" such "*part*" of the trade as he controls: and every legitimate effort he may make to extend his business is an attempt to monopolize a further *part* of inter-state trade. Such effort this law makes a criminal act. The *Northern Securities* case declares that the act prohibits the consolidation of two railroad corporations which compete with each other in inter-state commerce; it follows, by inevitable logic, that the act forbids the formation of a partnership between two merchants, competitors engaged in foreign commerce, and may even forbid a contract between these merchants by which one agrees to retire and sell out his business to the other.

It is only by large concentration of capital under centralized control that world-wide enterprises in trade and commerce can possibly be carried to success. The irresistible tendency of the present age in all kinds of business is toward the consolidation of resources and unified leadership. These combinations, if properly administered and regulated, instead of being injurious to the community, can be made to promote the highest public welfare; and they have now become so firmly established, their stock represents the invest-

ment of so large a portion of the people's wealth and is so widely owned by the poor as well as by the rich, that the business prosperity of the whole country is inseparably linked with the policy of concentration. To destroy these great combinations would mean universal devastation, would throw out of employment millions of workers and would cause a financial revolution the results of which, economic, political and social, it is impossible to estimate. It is becoming the sober judgment of the people that the regulation and control, and not the destruction, of this overwhelming tendency of trade toward concentration should be the only aim of legislation on the subject, and that the anti-trust law in its present form is a pernicious statute needing radical amendment; but the efforts made for its amendment have thus far failed to succeed.

THE INTER-STATE COMMERCE LAW

The inter-state commerce law is a much more voluminous statute than the anti-trust law. It contains numerous regulations, affecting the conduct of the business of common carriers, the violations of which are declared to be misdemeanors punishable by fine and imprisonment. By the original act, passed in 1887, and its amendments down to the year 1903, the individual trustees, officers and agents of a corporation engaged in inter-state commerce, who violated the requirements of the act, were made personally liable to the penalties provided; but the corporation itself in whose behalf and name they acted was not subject to criminal prosecution or penalty. In 1903, a law was passed which provided that every act of a corporation which under the previous law constituted a misdemeanor when done by a director or officer of the corporation should also constitute a misdemeanor against the corporation as well and subject the corporation to the fines prescribed by the act. In defence of this Act of 1903, it was alleged that under the previous law it was extremely difficult to secure convictions against the individual directors and officers; that the unlawful acts were committed by the corporation, which received the accruing benefit, and that the corporation and its property should justly be charged with the penalty. This change in the law has largely increased the number of criminal prosecutions against the offending corporations.

On the other hand, it has been urged that the Act of 1903 is violative of fundamental principles of equity. All the property of the corporation belongs to its stockholders, for whom the directors are only the trustees. The stockholders have no direct power in

controlling the transactions of the corporation and are guiltless and ignorant of any violation of the inter-state commerce law. If the law is violated, it is by the wanton act of the trustees and the officers and employes under their direction: they alone are the evil-doers and alone should be held liable for their lawless acts. Is it not a novel principle, the opponents of this law ask, to deplete the trust fund in order to make good the loss caused by misfeasance of the trustee? In reply it may be said that at every annual meeting of stockholders, a resolution is passed adopting and ratifying the acts of the trustees during the preceding year. The stockholders who vote for this resolution surely have no ground of complaint, for they have made themselves *participes criminis* with the trustees. Whether those stockholders who refused to join in such resolution and remain innocent of offense can compel the guilty trustees to make good the share of loss and damage that such stockholders suffer from the fine paid by the corporation, is a question in civil, and not in criminal, law.

What are known as the "immunity provisions" of this law have been the subject of serious criticism. Upon the trial of a criminal prosecution of a common carrier for violating the act, the trustees, officers and agents of the defendant may be compelled to testify and to produce any books or documents required, under penalty of fine and imprisonment for refusal. The act provides that no such witness shall be prosecuted or subjected to any penalty on account of any matter upon which he may testify or produce evidence (except for perjury if he testifies falsely); such immunity, however, extends only to the individual witness and not to the defendant corporation whose directors are thus compelled to testify. It follows that a corporation, charged with violating the act, may be proved to be criminally guilty by the enforced testimony of its directors who were themselves the immediate authors of the criminal act. But the corporation can act only through its directors and is held criminally liable for the acts of its directors because the directors are *quoad hoc* the corporation. Is it not an anomaly in criminal jurisprudence to compel a defendant to prove its own guilt?

Another result follows from this "immunity" provision that is violative of the principle stated in the Constitution of the United States in these words—"no person . . . shall be compelled in any criminal case to be a witness against himself." It is true that this clause in the Constitution relates to proceedings in the federal courts only, but the principle is universally accepted in this country as fundamental law. Many states in the Union have adopted statutes

relating to intra-state commerce quite similar in their provisions to the federal act relating to inter-state commerce. It is quite possible that an act done by a defendant in violation of the federal statute may also violate a state statute. Suppose that in such a case a corporation is prosecuted in the federal court under the inter-state commerce act, which makes both the corporation and its directors criminally guilty. The directors are compelled to testify (under the immunity clause) and their testimony proves the criminal act to have been committed by them and therefore by the corporation. The directors so testifying are personally exempted by the statute from penalty and from prosecution; but such exemption extends only to the federal courts, not to the state courts. Congress has no power to grant immunity from prosecution under state law. If these directors are subsequently prosecuted for the same illegal act in a state court under a state statute, their own testimony given in the federal court may be introduced in evidence, and they may be convicted upon the evidence that the federal statute compelled them to give against themselves. The act of Congress gives an immunity that is futile, and compels the witness to give testimony proving his own guilt, and upon that testimony alone the witness may be tried and convicted in a state court.

CHAPTER III

CRIMINAL LAW WITHIN THE JURISDICTION OF THE STATES

REFERENCE has been briefly made in the first chapter to some historical conditions which conduced to the development of differing systems of law, civil and criminal, in the thirteen original states. And in the thirty-three states that have been admitted to the Union since its foundation, the "sovereignty" of each has been demonstrated by the enactment of an independent body of law, with scant effort at harmony with the laws of the other states.

The resulting dissimilarity in the laws of the several states relating to the same subjects is the constant source of most perplexing legal problems. State lines have now been practically obliterated by the currents of inter-state trade and commerce. Goods are manufactured in New England upon contracts made in Illinois, the goods to be delivered in Texas; trans-continental lines of railroad traverse a score of states; a great corporation transacts business in every state in the Union; and yet on crossing each state boundary, every business enterprise encounters and is governed by diverse state laws. The conflict of state laws has thus come to be a serious incubus upon the industries and the prosperity of the country.

In the field of criminal law, one might reasonably look for greater harmony, amounting indeed to complete accord, between the laws of the several states. For all criminal statutes in all the states are drawn after the same pattern; all such statutes and all penal codes consist, and from time immemorial have consisted, of definitions of crimes and a statement of the punishment allotted to each separate crime. The aim of the penal codes has always been to graduate and apportion the punishment according to the degree of guilt involved in each crime; and this assumes the possibility of measuring the *relative* amounts of guilt that are inherent in all the various crimes defined in the codes. These degrees of guilt are expressed in terms of years of imprisonment, life sentences, fines or capital punishment; retributive punishment, inflicted on offenders and exactly appor-

tioned in each case to the amount of guilt indicated by the particular crime committed—this is the ideal of justice that seeks embodiment in the penal codes. It must be remembered that the criminal law of all the states alike is founded upon the Common Law; and that this same system of apportioning punishment according to the degree of guilt has prevailed for untold centuries. The conclusion would seem to be irresistible that (unless the system is essentially impracticable) by this time some consensus of judgment must have been reached as to the proper measure of guilt and of consequent punishment pertaining to the most common crimes. One might confidently look for substantial uniformity in the penal codes of a country divided into political states but inhabited by a homogeneous population sharing the same views and moral ideas and united in their interests and pursuits.

As a matter of fact, the very widest and wildest diversity and the most antagonistic conflict are found to exist in the penal codes of the several states of the Union. A few illustrations will suffice.

The maximum penalty for the common crime of perjury in the state of Connecticut is imprisonment for five years, in the adjoining state of New York twenty years, in Maine imprisonment for life, in Missouri death and in Delaware imprisonment for ten years with a fine of $500 to $2,000 and whipping with forty lashes.

The maximum penalty for rape in North Dakota is imprisonment for five years, in Louisiana, North Carolina and Delaware it is death.

The maximum penalty for incest is imprisonment for six months in Virginia, and for twenty-one years in Kentucky.

The maximum penalty for bigamy is imprisonment for six years and fine of $2,000 in Delaware, and imprisonment for twenty-one years in Tennessee.

The maximum penalty for assault with intent to kill is imprisonment for five years in Kentucky, imprisonment for life in Michigan and death in Louisiana, while assault with intent to commit rape is punishable by imprisonment for ten years in Kansas and by imprisonment for life in Massachusetts.

The maximum penalty for grand larceny varies from imprisonment for two years in Louisiana to twenty years in Connecticut.

The maximum penalty for breaking and entering a dwelling by night is imprisonment for seven years in Arkansas and death in North Carolina.

The maximum penalty for arson of an occupied dwelling by

night is imprisonment for thirty years in New Hampshire and death in South Carolina; for arson with intent to defraud insurer, imprisonment for one year and fine of $2,000 is the maximum penalty in Alabama and imprisonment for forty years in North Carolina.

The maximum penalty for forgery in Delaware is imprisonment for five years, a fine of $4,000, whipping with thirty-nine lashes and wearing a convict's jacket as an outer garment for one year after discharge from prison as a badge of crime; and imprisonment for life in South Dakota.

It would be tedious to pursue this comparison further, but the same disparity between penalties for the same crime, as fixed in the penal codes of the different states, will be found to exist throughout the entire list of crimes. This fact alone demonstrates the failure of the attempt to measure the guilt of any crime; there is no standard of measurement, no means of computation, no general concurrence of judgment, and the inequality of punishments means the denial of equal justice.

But it may be said that the *maximum* penalty is seldom inflicted and that, in actual administration of the law, the sentences really pronounced by the courts in concrete cases may exhibit a harmony and consistency that are lacking in the codes, and thus, after all, equal justice may in fact be attained. The United States census of 1890 affords the data for testing this suggestion. It contains a table giving the average length of the sentences actually pronounced for each of the principal crimes within each of the states. The figures thus given indicate, it must be remembered, not the heaviest sentence nor the lightest sentence, but the *average* length of all the numerous sentences pronounced in all courts throughout the whole state upon persons convicted of the crime named and in prison June 1, 1890. The average given therefore extends over a considerable number of years. This feature is omitted from the census of 1904 but there is no reason to suppose that the figures of 1890 are not substantially applicable to the present time.

The average sentence for the crime of perjury was ten years in Florida and one year in Maine.

For rape, thirty-three and one-half years in New Mexico and two years in Louisiana.

For incest, fifteen years in Louisiana and one year in Pennsylvania.

For bigamy, four and one-quarter years in Minnesota and four months in Montana.

For assaults, eleven years in Nevada and four months in the District of Columbia.

For grand larceny, ten years in Delaware and ten months in the District of Columbia.

For burglary, eight and one-third years in Georgia and one year and three months in Rhode Island.

For arson, seventeen and one-half years in Rhode Island and two years in Arkansas.

For forgery, seven years in New York and one and one-half years in Arizona.

The same diversity of judgment, in estimating the degree of guilt manifested by the commission of any given crime, exists among the judges who deal with concrete cases not less than among the legislators who enact general statutes.

The statistics thus far cited prove that there is no common standard of measurement to fix the just amount of punishment for any one crime. But the difficulty is greatly increased when the attempt is made to determine and compare the relative guilt of different crimes and to weigh one crime against other crimes bearing no relation to it. This, however, the penal codes, which assume to affix to every crime its just punishment, are forced to undertake; and the result yields further proof of the impracticability and positive absurdity of the attempt to reach justice through a computation of relative degrees of guilt measured by the maximum penalties in different codes. Many striking comparisons are found in the appendix to the census of 1890, from which a few only are here cited.

The guilt of counterfeiting in Ohio and Minnesota is twice that of perjury, but in Rhode Island and Alabama the guilt of perjury is twice that of counterfeiting.

The guilt of perjury in Indiana is to that of incest as twenty-one to five, but in Kentucky the guilt of incest is to that of perjury as twenty-one to five.

In Virginia the maximum penalty for bigamy is sixteen times that for incest, but in Wyoming and Colorado the maximum penalty for incest is ten times that for bigamy.

The guilt of mayhem in Ohio is twice that of burglary, but in Michigan the guilt of burglary is twice that of mayhem.

The guilt of arson in Pennsylvania is twice that of burglary, but in Connecticut the guilt of burglary is twice that of arson.

The guilt of forgery in Kansas is four times that of larceny, but in Connecticut the guilt of larceny is four times that of forgery.

The irrational and absurd character of the theory upon which all criminal laws are constructed can receive no more conclusive demonstration than that yielded by a comparison of the penal codes of the different states of the Union. The impossibility of measuring crimes by their supposed guiltiness and the damaging results that flow from the attempt to do so, together with the only logical cure for these evils, are more fully treated in subsequent chapters entitled The Punitive System and The Indeterminate Sentence.

The bad results of these conflicting systems would not be so injurious if the states were inhabited by separate nations having no organic connection with each other, like the distinct nationalities occupying the continents of Europe and South America; but the people of the United States are so united by community of sentiments and pursuits that the affairs of each state are followed with keen interest by the rest. The newspaper press devotes especial attention to crime, searching through the length and breadth of the Union for circumstantial accounts of crimes committed and giving full reports of notable criminal trials. The inequalities of the penal codes thus publicly exhibited cannot fail to excite derision and contempt; the claim of the criminal law that it dispenses equal justice is proved a false pretense. It is often said that reverence for law is one of the main bulwarks of civilization. How can the people revere a criminal law embodied in penal codes that are in irreconcilable conflict with each other, that rest upon no rational basis, and that administer punishments which are grossly unequal and hence grossly unjust?

It would be interesting to know what effect these diverse punishments have upon the volume of crime. Does the severer punishment increase or diminish the number of crimes committed? Unfortunately, there are no statistics complete enough to furnish a satisfactory answer to the question; but so far as the statistics we have throw any light upon the subject, they seem to indicate an *increased* prevalence of a given crime within the state which punishes that crime with inordinate severity. If this is true, it would serve to confirm the prevailing opinion that the penal law exerts only a slight deterrence upon criminals. The fear of punishment does doubtless have a restraining influence upon the non-criminal masses of men, but its deterrent force upon those addicted to crime is probably very limited. Excessive and unjust punishments tend, apparently, to increase the volume of crime.

While the conflict of state laws exacts more attention from the civil than from the criminal courts, there is one crime, that of bigamy,

that is seriously affected (and indeed increased) by the diversity of the laws in the several states regarding marriage and divorce. The legal grounds upon which a divorce is granted vary excessively in the different states; in some of the states, adultery is the sole ground, while in others cruelty, desertion and even incompatibility of temper, are made a sufficient cause for absolute divorce. A husband or wife, desiring to obtain a divorce but having only flimsy cause for it, removes to one of the "easy" states, establishes a residence there and brings a suit for divorce in a court of that state. The defendant, living in another state, can be served with process only by publication and, not unwilling perhaps that a divorce should be granted, allows judgment to go by default. Judgments of divorce thus obtained have caused endless complications and trouble. This can best be illustrated by an actual instance which has become a leading case (*People v. Baker*, 76 *New York Reports*, 78).

Francis M. Baker was married in the state of Illinois to a resident of Illinois in the year 1871. After the marriage he brought his wife to New York where they established their home and lived together for a year or more. A separation then occurred and Mrs. Baker returned alone to her father's house in Illinois and became a permanent resident of that state, the husband retaining his domicile in New York. Two years after her return to Illinois, Mrs. Baker brought a suit against her husband in a court of competent jurisdiction in the state of Illinois to obtain an absolute divorce on the ground of "gross neglect of duty." By the laws of Illinois, "gross neglect of duty" was one of the grounds upon which an absolute divorce could be granted; by the laws of New York an absolute divorce could be granted for adultery and for no other cause. The defendant husband being in New York, process in the suit could not be served upon him personally in Illinois; service could be had by publication only and he was thus served in accordance with the laws of Illinois. The husband interposed no defense and entered no appearance in the suit. The plaintiff duly proved her case by competent evidence, the court granted her an absolute divorce from her husband, and judgment to that effect was duly entered in 1874. Mrs. Baker, having obtained such divorce, married a second husband in Illinois in 1875 and continued to reside (with him) in that state until her death in 1876. Such second marriage was valid by the laws of Illinois.

Some six months after the judgment of divorce, Mr. Baker also married again, being still domiciled in New York. For this second marriage, which took place in New York, he was indicted in New York

for bigamy. Upon the trial he pleaded in defense the Illinois judgment of divorce. In rendering judgment of conviction the New York court conceded that the divorce suit was regularly conducted in accordance with the laws of Illinois and was perfectly valid within that state. Mrs. Baker, being a resident of Illinois and within the jurisdiction of its courts, suing for the establishment of rights secured to her by its laws, was entitled to the judgment she demanded and by virtue of that judgment was effectually divorced from Mr. Baker and afterward became the legal wife of her second husband. But the jurisdiction of a state court is limited to parties and *res* within that state. Every state has the power to fix and determine, through its own courts, the legal status of its own citizens. But no state has the power to judicially change the status of a citizen of any other state from that of being a married man to that of being an unmarried man, unless such citizen comes within the boundaries of the former state and is there served with its legal process or voluntarily appears by attorney in its courts. It was held therefore that Francis M. Baker, not having been brought within the jurisdiction of the Illinois court, was unaffected by its judgment, and, his first marriage not having been legally dissolved *as to him*, he was guilty of bigamy. He was sentenced to state prison for five years.

This case involves some deplorable and confusing consequences. Baker remained the husband of his first wife in New York, while she was no longer his wife in Illinois or anywhere else. A marital connection that is unilateral only is as puzzling as it is anomalous. But *People v. Baker* has never been overruled; on the contrary, it has been consistently followed and approved in numerous adjudications and its reasoning and conclusions have been confirmed by the latest decisions of the Supreme Court of the United States. It is difficult to impeach or escape the logic on which these decisions rest. They afford a convincing illustration of the unavoidable evils resulting from the conflict of state laws. How to bring these laws into uniformity is one of the serious problems now confronting the American people.

The only constitutional method by which such uniformity can be attained obviously lies in concerted action by the states themselves. The state of New York took the lead in this direction by the passage of an act in 1890 (Sess. Laws Ch. 205) which created a commission to "ascertain the best means to effect an assimilation and uniformity in the laws of the states" and "to invite the other states of the Union to send representatives to a convention to draft uniform laws to be

submitted for the approval and adoption of the several states." Similar statutes were passed by other states in response to this invitation and thus the body was constituted which is known as the State Boards of Commissioners for Promoting Uniformity of Legislation in the United States. This body held its first Congress in the year 1892 and has met annually ever since. It has accomplished some good results, but has thus far confined its labors to matters of civil (as distinguished from criminal) law.

Following the precedent thus set by the state of New York, the legislature of Pennsylvania passed a law in 1905 under which the governor of that state extended an invitation to the other states of the Union to send delegates to a convention to meet at Washington to consider the diverse laws of the several states relating to marriage and divorce. In acceptance of this invitation, delegates representing some forty-two states assembled in Washington at the time appointed (Feb. 19, 1906) and formed the National Congress on Uniform Divorce Laws. During that year, this congress formulated a proposed "Act regulating annulment of marriage and divorce" and submitted it to all the states, recommending its universal adoption.

The American Bar Association, the National Conference of Charities and Correction and The American Prison Association, together with other agencies, have labored to awaken in the public mind a sense of the evils that result from conflicting state laws; but while some progress has been made in the direction of uniformity, the progress made has utterly failed to keep pace with the increasing and crying needs of the country for harmony in the systems of state legislation.

Prison labor presents a difficult problem in this country. Labor unions have assumed generally a position of hostility toward labor in prisons, partly because they have regarded prison labor as wrongly competing with free labor, and partly because the unions are unable, by strikes or boycott or other coercion, to control or to affect such labor as is carried on in prisons. There is also a popular feeling widely prevalent that productive industry in the prisons causes competition with outside labor which operates unjustly and is distinctly injurious to the free workman. The public, moreover, regards prison-made goods with positive aversion, rendering it difficult to find a favorable market for them. These are some of the causes that prove adverse to the establishment of a satisfactory system of prison labor.

That any kind of productive work of value done by prisoners might be done by free workmen and diminishes by so much the amount of work open to free labor can hardly be denied. It must also be admitted that goods manufactured in prison and placed on the market come into competition with similar goods made by free labor. The practical injury done to the free workman by this competition may be so small as to be negligible; indeed, it has been estimated that the value of prison-made goods amounts to one-sixth of one per cent of the value of the total manufactured product of the country. Still, theoretically and technically, competition does, and must, exist. No useful productive industry can possibly be carried on in prison that does not, logically, compete with free industry. The popular error consists in regarding this competition as an injustice to the free laborer. It is the duty and the privilege of every man who is able, to be self-supporting; this duty is owed to the state, which has no right to support at the public expense any man who is competent to support himself. And yet every man who supports himself by his own labor comes into competition with the laboring class. Such competition is rightful and no grievance of which the laboring class can complain. It is difficult to comprehend how the public can have forgotten these axiomatic truths so far as to regard the convicted criminal as a favored individual, exempt from the universal obligation, who, by the commision of a crime, has earned a right to be supported in idleness at the public expense. Surely, no imaginable member of a community has a weaker claim upon the liberality of the state than the convict who has broken its laws and defied its sovereignty. One supreme duty the state owes the imprisoned criminal. His confinement disables him from seeking work; the state should furnish him the means of earning his support by his own industry. When the state has done this, the convict is placed in the same relation to labor as the free workman outside the prison and is invested with the universal duty and right to work for self-support. This duty is not weakened, but is rather heightened, by the fact that he has committed crime and his competition with free labor is as just as it is inevitable.

There are no principles of scientific penology more firmly established than those relating to prison labor. Labor is the *sine qua non* of reformation, but it must take the form of productive industry. Mere physical toil, as with the treadmill and the crank, is not conducive to reformation; it is debasing and brutalizing. It is desirable that the labor should be not purely mechanical but of a

kind that may excite intelligent interest and give occasion for the exercise and development of skill. Such industries, moreover, should be employed as may be useful to the prisoner by furnishing him with the means of earning a livelihood after his discharge from prison. In a large prison, many diversified industries should be introduced, fitted to the varying capabilities and aptitudes that are sure to be found in any considerable body of prisoners.

These obvious requirements have not been satisfactorily met in many of the prisons in the United States, although experiments have been made without number. All the various systems of administering prison labor find exemplification in the laws of the different states.

That which prevails largely in the southern states is known as the lease system. The state leases out to a contractor a certain number of convicts for a specified term of years at an agreed price; the contractor assumes the custody and discipline of the prisoners, clothes and feeds them, and works them for his profit. They are generally confined at night in convict-camps or stockades. These camps are subject to supervision by the state, but the supervision is exercised with such laxity that the gravest abuses and cruelties have been practiced and have made the camps in many instances places of unutterable horror. In recent years, public sentiment in the south is being aroused by the exposure of these abuses, and there is reason to hope that the lease system may be doomed to early extinction. The system itself is wholly indefensible upon principle; the renunciation by the state of its responsibility for the care and training of its prisoners and the commitment of them to the mercies of a contractor to be exploited for gain, under circumstances which make reformation a mockery, are opposed not only to every principle of modern penology but to every humane instinct.

The practice in the other states of the Union exhibits large variety. The contract system, the piece-price plan, the public account system under which goods are manufactured by the state either for sale in the open market or for use in public institutions, and the employment of the prisoners on public works—all these systems are used in the different states, with frequent changes and variations.

The history of legislation upon prison labor in the state of New York during the past generation is interesting and instructive; it is somewhat typical, reflecting progressive changes in public sentiment which have taken place in other states as well. Forty years ago the contract system prevailed generally in the prisons of New York.

The contractor, a manufacturer of stoves for instance, hired from the state the labor of a certain number of prisoners for a fixed term of years at a certain price per day for each man. The custody, maintenance and discipline of the prisoners remained with the state, which supplied work-shops within the prison. The contractor furnished the necessary tools and equipment, together with the raw materials, to be used in the manufacture, supplied instructors or overseers to superintend the workmen, and sold the finished products in the open market. This system encountered bitter opposition; first, from outside manufacturers who complained that they were threatened with ruin because the prison-made goods were produced at so low a cost as to render competition impossible, and second, from those who were interested in prison reform. It was urged that the presence in the prison of the contractor and his representatives interfered with the absolute control that the state should exercise in the discipline and training of the convicts; that the labor of the prisoners, being mere slave labor, aroused no interest and offered no incentive; that the labor ought to be administered under the sole authority of the state as an education to the convict and as a means of reformation.

In 1884, an act was passed forbidding the extension of any existing contract or execution of any new contract for the employment of convicts in any prison in the state. The abolition of the contract system was followed by resort to the public account system, which had indeed been used to a limited extent for many years concurrently with the contract system. Under the public account system then in use, the state engaged in the business of manufacturing goods for sale in the open market. The prison was operated as a factory; the state provided the necessary working capital, installed the machinery, bought the raw material, trained the convicts to do the labor, and marketed the product at the best rates that could be obtained. This system also met with popular condemnation. The state, it was alleged, entering the market as a capitalist with unlimited resources and employing labor without paying any wages, was a far more formidable competitor than the prison contractor had been. The tendency of the system was to diminish the profits of the outside manufacturer and to reduce the wages of the free workman.

The resultant agitation led to the drastic Act of 1888 which provided that no prisoner in any penal institution in the state should be allowed to work at any industry where his labor, or the product of his labor, should be farmed out, contracted or given or sold to any

person whatsoever. The passage of this law produced the absolute suspension of prison labor in all the state prisons, whose inmates were kept for nearly a year in enforced idleness. The result afforded a most impressive object lesson upon the value and necessity of prison labor. The convicts made most piteous appeals to their wardens for employment, for work of any kind; a large number of them became insane; and as the situation continued unrelieved, the spirit of discontent among the prisoners became so turbulent as to threaten positive revolt and riot. Public sentiment was aroused and public meetings were held in sympathy with the prisoners and in bitter protest against the intolerable condition to which they were reduced by the want of employment. This obnoxious law was repealed the next year after its enactment.

In 1889, the act was passed which was known as the Fassett law. This was a comprehensive code of prison law covering the entire field of prison administration. Its key-note was the reformation of the prisoners and the whole act was characterized by broad and enlightened views, though somewhat in advance of its times, which made the Fassett law the most admirable piece of legislation relating to prisons that had ever been enacted on this side of the Atlantic. Its provisions regarding prison labor (which resulted from a compromise between conflicting interests) were, possibly, over-elaborated. These were prefaced by the following section:

> Section 95. The superintendent of state prisons shall direct the classification of prisoners into three grades or classes, as follows: In the first grade shall be included those appearing to be corrigible or less vicious than the others and likely to observe the laws and to maintain themselves by honest industry after their discharge; in the second grade shall be included those appearing to be incorrigible or more vicious, but so competent to work and so reasonably obedient to prison discipline as not seriously to interfere with the productiveness of their labor, or of the labor of those in company with whom they may be employed; in the third grade shall be included those appearing to be incorrigible or so insubordinate or so incompetent, otherwise than from temporary ill health, as to seriously interfere with the discipline or productiveness of the labor of the prison.

The act provides for rules and regulations governing the treatment, discipline, education and training of the convicts, and for a

strict record of the antecedents, the conduct, the progress and the failures of each convict, thus providing the means for an intelligent classification.

The labor of the prisoners of the first grade was to be directed with the sole aim of fitting them to maintain themselves by honest industry after their discharge from the prison; they might be employed at hard labor for industrial training and instruction only, although no saleable products resulted from their labor; but, so far as was consistent with the primary aim of reformation, their labor was to be made productive.

The labor of the second grade was to be directed primarily to secure the production of things useful and saleable, but secondarily to fit the prisoners for self-support after their discharge even though their labor was thereby rendered less productive.

The labor of the third grade was to aim solely at healthful exercise and the manufacture, without machinery, of such articles as were needed in the public institutions of the state or such other manual labor as should not compete with free labor.

The productive industries of the prisons were directed to the manufacture of merchantable goods which were sold for account of the state. The system resulted in heavy outlays for tools and machinery and in a vast accumulation of raw material and manufactured goods; it proved far from profitable to the state but it possessed the advantage of furnishing the convicts with constant employment at useful labor.

All this was radically changed by the amended state constitution of 1894, which contained the following section upon prison labor:

> The legislature shall by law provide for the occupation and employment of prisoners sentenced to the several state prisons, penitentiaries, jails and reformatories in the state; and on and after the first day of January, 1897, no person in any such prison, penitentiary, jail or reformatory, shall be required or allowed to work while under sentence thereto, at any trade, industry or occupation wherein or whereby his work, or the product or profit of his work, shall be farmed out, contracted, given or sold to any person, firm, association or corporation. This section shall not be construed to prevent the legislature from providing that convicts may work for, and that the products of their labor may be disposed of to, the state or any political division thereof, or for or to any public in-

stitution owned or managed and controlled by the state, or any political division thereof.

The adoption of this section was earnestly opposed by many persons who realized the absolute necessity of prison labor as a means of reformation, While it was generally conceded that the work for public institutions contemplated by the section was ideally the best form of prison labor, serious apprehension was felt that a sufficient amount of this kind of work to afford constant employment for all the prisoners could not be provided. Stringent statutes have since been passed requiring public institutions (of the kind designated in the constitution) to purchase their manufactured supplies from the prisons, and making it unlawful to purchase them elsewhere, unless the prisons are unable to furnish them. It required years of preparation to adjust the prisons to the new situation; it became necessary to establish and equip plants adapted to the manufacture of a considerable variety of goods, to instruct the convicts in new kinds of labor, to regulate the supply to fluctuating demands in different lines of manufacture.

Many public institutions employ their inmates in making their own supplies, and it would be highly injurious to deprive these inmates of such labor. Various trades which formerly supplied the public institutions besiege the legislature with applications to except and exclude their trades from the prisons. The printers have been successful and secured the passage of a law in 1898 which declared that no printing or photo-engraving should be done in any penal institution in the state, except such printing as was required for penal and state charitable institutions. This law greatly restricted the field of labor available for the prisons, as the state printing and other public printing would have furnished continuous employment for a large number of convicts.

Upon the whole, the apprehensions entertained by the opponents of the new system introduced by the amended constitution have been fully justified. While it is claimed that the convicts in the state prisons are now furnished with employment, more or less constant, the prisoners confined in the penitentiaries and jails are for the most part kept in enforced idleness. The demands of public institutions for labor, over and above what can be done by their own inmates, are not large enough to afford constant employment for all the prisoners in all the penal institutions of the state; and the constitution has cut off every other resource for prison labor. Unless some new form of labor for public account shall be devised by the legis-

lature, a large percentage of the prisoners within the state must remain in idleness.

The employment of convicts at agriculture has been strongly advocated. In the most southern states of the Union, such work could perhaps be carried on throughout the year, but in the northern states it would not furnish employment during the winter months. Moreover, under the restriction of the New York constitution, the crops raised (being the product, or at least the profits, of convict labor) could not be sold in the general market; only such crops could be cultivated as could be used in public institutions; for example, corn, grain, potatoes, etc. The cultivation of garden vegetables would have to be limited, for the most part, to those supplied to institutions nearby. A New England farmer, with the help of a single hired man, will till a farm of a hundred acres. It is manifest that to employ a thousand or even a hundred convicts at constant farm labor an immense tract of land would be required with a large force of guards, and the product might easily be made too large to supply the available demand. Under the limitations imposed by the New York constitution, but a small fraction of the total number of convicts within the state could be profitably employed in agriculture.

Statutes have been passed authorizing the employment of convicts in improving the public highways, and this form of labor has received a good deal of popular advocacy. Generally, it has not met the approval of prison reformers. To make a public exhibition of convicts is not conducive to their reformation. Even the admission of the public to the prisons as visitors has been proved to have a disturbing and injurious effect on the discipline and morale of the prisons. The reformation of the convicts is best promoted by their strict seclusion from the outside world, so that the reformative influences, which are designed to suppress old associations, ideas and motives, and to awaken new ideals and hopes, may be allowed to operate without interruption and to gain an engrossing power in the convict's life. Convicts working in the public highways are a public spectacle. They are exposed to the jeers and comments, or at least to the frowning stare, of every passer-by; they are constantly reminded that they are objects of public abhorrence and regarded as public enemies. All this is calculated to keep alive in the breast of the convict a sense of his degradation and to arouse a spirit of defiance; if every man's hand is against him, his hand shall be against every man.

The same difficulty in providing a sufficiency of labor in the

prisons that is now experienced in New York would be met by every other state adopting the New York system. Some new forms of prison labor which shall satisfy on the one hand the requirements of a reformatory system and on the other the economic demand that the prisoners earn the cost of their support, are still awaiting discovery and development. In the meantime, the problems of prison labor remain unsolved in the United States.

The contest against crime in this country is carried on under some difficulties that are peculiar to the United States. The wide extent of the country covered with a net-work of railways affords the criminal unusual facilities for rapid escape and concealment. There is no registration of the population here (like the *casier judiciaire* in France), nor passport system between states; every person has absolutely unhampered freedom of movement from any point in the United States to its remotest corner. The people of this country are largely of migratory habit, frequently changing their residence from one state or locality to another. It follows that less interest and curiosity are directed toward a stranger or even a neighbor here than in communities more stationary. It will be remembered that when William M. Tweed, under indictment for peculation and fraud in looting the treasury of the city of New York, escaped from the officers who had arrested him, he crossed the Hudson River into the state of New Jersey. There he remained in security for months, actually within sight of the city of New York, while the keenest detectives were scouring land and sea and following every clue in their fruitless search for him.

The difficulty of detection and capture is further enhanced by the large number of foreigners (a million or more per year) immigrating to the United States and adding to the population strange faces, many of which to our unaccustomed eyes look just alike. There arises a special need in this country for ready and effective means of identifying persons accused of crime. Both the Bertillon and the finger print systems of identification are in use in the United States, one or both of these systems having lately been adopted by state authority, and used to a limited extent, in nearly three-quarters of the states of the Union. The state of New York has established a central bureau at Albany where records of identification are received from all the penal institutions of the state, and where the collection amounted in 1908 to over 70,000 individual Bertillon records and 6000 finger print records. A central bureau of criminal

identification under federal authority is maintained at the United States prison at Fort Leavenworth, Kansas, where records taken under both systems are received from all penal institutions and police departments, state as well as federal, throughout the Union. The use of identification systems is being rapidly extended, with the prospect that in a few years it will be universally enforced in all the leading cities and penal institutions in the country. The time is probably not far distant when the central bureau at Fort Leavenworth will furnish the means of identifying most of the habitual criminals and recidivists within the United States.

Another source of difficulty, more serious than any other, in the detection and apprehension of criminals, arises from the territorial limit of state jurisdiction. A warrant of arrest issued from a state court in New York, cannot be executed across the line in Connecticut or New Jersey. The federal constitution, it is true, provides that "a person charged, in any state, with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." But the preparation of the papers necessary to obtain such extradition consumes time, when hot haste is sometimes demanded to catch the fugitive. Suppose a crime committed in New York and the New York detectives in pursuit of the escaping criminal have located him in Chicago. He can be arrested in Chicago only by an officer having authority under the laws of Illinois. It can hardly be expected that the Chicago police will exert quite as much alertness, skill and vigilance in the detection and capture of a fugitive from New York as in catching an offender who has committed a crime in their own precinct. For the latter crime they are in a degree responsible and their reputation as well as their duty demands that they must find and arrest the culprit; it is their first and special business to protect their own precinct from crime and there is crime enough in Chicago to engross all their energy. It follows, naturally, that when the offender has once effected his escape into another state his chances for slipping through the meshes of the law are largely increased. It is more difficult to find him and far more difficult, when he is found, to accomplish his actual seizure before he can again disappear.

Our criminal jurisprudence requires that every criminal trial must be held within the state where the crime was committed. One exception is in the case of larceny; where a person has in one state

stolen goods which he has carried into another state, he can if arrested there be brought to trial in the latter state. But, by the general rule, the detection and punishment of crime devolve upon the state where the crime was committed, although that state has no power to pursue and apprehend the offender if he has escaped into another state. The states are thus unfortunately handicapped in contending against crime, but, under our constitutional system of state sovereignty, the difficulty appears to be inevitable.

The collection and compilation of criminal statistics in the United States are extremely imperfect. Many of the states have laws requiring the transmission by local courts and officers to a central state office of a record of the number of arrests and convictions; but these laws are loosely observed and the records thus obtained are fragmentary and unreliable. There is lack of uniformity in the statistical systems of the several states, making difficult any attempt to gather together and to tabulate and compare the records of all the states. The only statistics regarding crime that embrace the whole country are those taken by federal authority and appearing in the decennial census of the United States. But no census prior to 1904 went further than to enumerate and classify the prisoners actually serving under sentence in all the prisons in the United States on the 30th day of June of the census year. In 1904, the additional feature was introduced of enumerating all the commitments and sentences for the calendar year 1904. It is a comparatively easy task to count the prisoners in all the prisons on a given day; but it is quite a different task to ascertain the number of commitments and sentences for a period of twelve months. Owing to the immense number of courts, especially those of inferior jurisdiction, within the United States, and the imperfection of their records, it is hardly possible to accomplish the latter task with accuracy; nothing more than a result approximately correct can be expected.

With regard to the vital question, Is crime increasing? it is doubtful whether it is practicable to gather any statistics that will yield an answer. The confident assertion that crime is increasing is frequently made, and in its attempted support appeal is made to the statistics of crime. It is claimed, on the other hand, that a careful analysis of the statistics fails to sustain the assertion. The difficulty is that all official criminal statistics are necessarily confined to those instances of crime that come before the courts or for which arrests are made. If these instances increase in number, the fact

may be owing to an increase in crime or it may be the result of greater vigilance and success on the part of the police in making arrests. Indeed, it may be accounted for by numberless causes other than the inferred increase of crime.

For the cases of crime that come before the courts are but a fraction, and doubtless a minor fraction, of the total number of crimes committed. There are countless crimes, the perpetrators of which escape detection: secret crimes, the existence of which is unknown or is perhaps discovered by accident years afterward; crimes, the victims of which fail to bring them to the knowledge of the public authorities, from fear of evil consequences to themselves, or because they shrink from the publicity of prosecution, or because the offender is a near relative whose exposure would disgrace the victim's family, or because of pity for the offender professing penitence, or pity for the offender's family. All these crimes, the specification of which might be indefinitely extended, enter into the volume of crime, but do not and cannot appear in official statistics of crime. There is no possible means of determining the ratio these unpublished crimes bear to the statistical crimes, or whether there is any fixed relation in amount or number between the two classes of crime. If one of the classes increases, it affords no evidence that the other class is also increasing; it may well be that as one increases the other decreases. Both classes together make up the volume of crime; and whether this total volume is increasing or not can never be determined by any statistical measurement of a minor part of the volume, without any possible knowledge of the relation that part bears to the residue.

The criminal law is only one of the instrumentalities that war against crime; there are other forces, educational, philanthropic, religious, that are vastly more effective. Whether crime is increasing or diminishing is a problem that can receive no mathematical or demonstrative solution; the best approach to a solution is by way of comparison between successive ages or periods of time. If we go back several centuries, we cannot fail to perceive that crime was then, to an immense degree, more prevalent and more brutal than it is now. Nothing is more obvious in the historical development of civilization than its humanizing influence on society; by nurturing the sense of justice, respect for law, self-restraint and self-respect, abhorrence of violence and of crime, it has effected a moral transformation in popular sentiment and character. "The mills of the gods grind slowly." But, there is a leaven in Christian civilization that is ever active with a divine potency, irresistible as the flight of time.

CHAPTER IV

THE PUNITIVE SYSTEM OF CRIMINAL LAW

THE origin and the early history of the criminal law in the Anglo-Saxon race are not altogether lost in obscurity. Originally, crime appears to have been regarded only as a wrong done to the individual victim, and he was deemed its rightful avenger. The repression of crime was left in large measure to the natural passion of the sufferer for revenge and, when a crime was committed, it was the right (perhaps the duty) of the individual whom the crime had injured and his next of kin to pursue the offender and to inflict summary vengeance upon him. The law sought to regulate the exercise of private vengeance by limiting it within reasonable bounds, by establishing cities of refuge, and by other measures designed to restrain its unbridled indulgence. In that turbulent age, however, all these restraints were powerless to prevent blood-feuds and the increasing prevalence of private war. The license of individual vengeance was incompatible with public order and became intolerable; it was from necessity abrogated and its exercise was declared illegal. But the law could not repeal or weaken the universal sentiment of the time, which not only demanded vengeance upon the criminal but could not even conceive of any method of repressing crime except by putting the criminal to death or subjecting him to vindictive punishment.

The infliction of vengeance, forbidden to the individual, was simply transferred to the body politic; for the private avenger was substituted the public avenger. The change was logically effected through the evolution of a political theory defining the function of the governing power in its relation to crime. This was the theory: that crime was a public, more than a private wrong, doing greater injury to the public than to the individual; that the state, representing all its subjects and the whole people, was thus the supreme sufferer from crime; and, consequently, that the state and not the individual victim, was the rightful avenger of crime. The state, with its unrestrained power, proved an even more terrible and relentless avenger than the individual had been. The most vindictive

punishments and the cruelest tortures that malignant ingenuity could devise were practiced under the sanction of law and in the name of justice.

From the earliest time, the attempt was made to graduate the severity of the punishment to the enormity of the offense. Laws were made defining the various crimes, assuming to admeasure their comparative degrees of guilt, and assigning to each crime its proportionate amount of punishment. These laws were always animated by the primitive motive of vengeance; they had the single aim to balance punishment and guilt and to inflict on the criminal an amount of suffering or damage that should be commensurate with the guilt of his crime. Compensatory retribution, measuring guilt in terms of pain, was the visionary ideal of the law and its only end.

The refining influences of Christian civilization have tempered the cruelty of previous ages in the practical administration of the criminal law. Tortures have long disappeared and humane efforts have been made to improve the sanitation and the morale of the prisons, but the motives and principles which governed the development of our criminal law centuries ago have remained unchanged down to the present generation. The modern penal codes are *fundamentally* exact reproductions of those of the middle ages. True, the modern codes contain different definitions of different crimes and prescribe different punishments; but, like the ancient codes, they are composed of definitions of crimes and allotments of punishment to each crime; like the ancient codes, they assume to admeasure the guilt of crimes and to weigh and assort them according to defined degrees, and all for the purpose of assigning to each offense an amount of punishment that shall be exactly apportioned to the measure of guilt in the offender. Not only in form but in purpose and principle the modern codes are duplicates of the ancient ones. In both alike, the sole aim in dealing with the criminal is the infliction of retributive pain and suffering which having been endured shall serve to atone for the crime and to be imputed to him for righteousness, restoring him to freedom as if he had never committed a crime; in both codes alike, the court is required at the trial to probe the soul of the prisoner, —measure the length, breadth and depth of its guiltiness and the equivalent amount of atoning punishment,—and then and there pronounce the mathematical sentence.

It is possible that the system just described may be as creditable a product as could be expected from the crude age which originated it. Perhaps it has equal merit with the grotesque systems of phi-

losophy, filled with wild vagaries, of which the medieval schoolmen were the authors. But it is a wonderful fact that this ancient system of criminal law, based upon assumptions that are obviously false and upon ideals that are not only impracticable and valueless but clearly impossible of attainment, is still accepted in the present enlightened age and still has wide prevalence as a working system among progressive nations throughout the world. The fact itself, however, raises a strong presumption in favor of the system, and in assailing the system it is freely recognized that the assailant bears the entire burden of proof.

The modern (as well as the ancient) penal codes *assume* that crimes are susceptible of general definitions that can be practically applied to concrete instances. They *assume* that each defined crime involves an equal or uniform amount of guilt or criminality in the offender in every case whenever and wherever that crime may be committed. They *assume* that whenever two persons are convicted of committing an assault (for example) under circumstances (or, rather, under such circumstances as are admissible in evidence) which fulfill all the terms and conditions of its definition, both persons are equally guilty and should receive the same punishment. They *assume* that the amount of an offender's guilt can be estimated from the particular crime which he is proved to have committed. They assume the possibility of admeasuring the degree or amount of criminality in an offender and of expressing it in terms of years of imprisonment. They assume the possibility of weighing and of expressing the relative amounts of criminality in widely different crimes (assault and larceny, for example). They assume that sentences of imprisonment for the same number of years pronounced upon several offenders inflict the same or an equal punishment upon each.

Let us pause here to examine the tenability of these various assumptions, all of which are fundamental in the penal codes.

Definitions are necessarily generic and academic; every crime actually committed is special and individual. Crimes of the same name have infinite variations arising from outward circumstances, which are never an exact reproduction of a previous instance, and variations arising far more from inward, subjective, conditions in the mind and character of the culprit. All these variations are vital elements in any attempted computation of the offender's guilt, and most of them are necessarily excluded from any general definition. Consider a few of these vital elements of guilt which surround every

criminal trial and yet are seldom matters of evidence or brought at all within the cognizance of the court. There may be causes of provocation which have operated on the mind of the offender with cumulative force during a long series of years until they culminated in a sudden frenzy of rage; there may be misunderstandings, misapprehensions, mistakes regarding facts, under which the apparent crime was committed; indeed, there is an infinite variety of conceivable facts, aggravating or palliating a crime, which are wholly inadmissible in evidence and are known only to Omniscience, and yet they may be the essential, really vital, factors for any true estimate of guilt. Still more inaccessible are the subjective elements existing in the character of the person accused, without a knowledge of which any computation of guilt is impossible; there are questions of hereditary tendencies, of parental training, of environment, of natural strength or weakness of will and of conscience, of education, of degrees of intelligence or ignorance, of experience, of natural dullness or brightness of mind, of constitutional force or sluggishness of physical passions and appetites. With these recondite, yet determining, factors beyond the possibility of human ken, the effort to gauge the amount of guilt in any crime is one that the Supreme Intelligence alone can attempt. No more chimerical and hopeless enterprise has ever been undertaken by the human mind than to construct a code which shall with accuracy and justice define all crimes and tabulate them with their respective degrees of guiltiness.

The assumption of the codes that the nature of the crime committed affords an index to the degree of criminality in the offender, and that the greater the enormity of the crime, the greater is the degree of guiltiness in the person who commits it, is contradicted by experience. It is the testimony of those who have had large experience in the charge and management of prisons that the crime for which a prisoner has been convicted affords no index of his character. It is often found that those convicted of grave felonies are more amenable to reformative influence than some who are sentenced for minor misdemeanors. A petty thief, for instance, may prove more obdurate and vicious, more irreclaimable in his wickedness, than some of those who have committed most flagrant crimes.

So, the assumption that the same sentence inflicts the same punishment, when pronounced upon different persons, is untrue. The effect is governed by individual temperaments. A hardened offender may serve the sentence with phlegmatic apathy; he may have served many similar sentences before. A prisoner of more

sensitive temperament, perhaps a novice, who has seen better days and has not yet lost all pride and self-respect, is overwhelmed with a sense of shame at the disgrace of imprisonment, and its hardships and ignominies bear upon him with the force of torture.

Another feature of the punitive system which perhaps is practically its most dangerous feature, is its doctrine of atonement, holding that when a convict has served out the term of his sentence he has atoned for his crime and is entitled to immediate release. This is supposed to be the logical corollary of retributive punishment. The idea may possibly be traced from the Saxon law which established an elaborate scale of money fines for various crimes; these fines were the purchase price, or compensatory retribution, to be paid by the offender for committing the crime and, when the fines were fully paid, the offender was of course absolved and became exempt from further prosecution. In the same manner, when imprisonment came to be the general form of punishment it was regarded as a penalty imposed, and when the culprit had served his term he had fully paid the price charged by the state for his particular crime and had satisfied all the demands of justice.

Perhaps there is some conflict here with the modern conception of atonement. Suffering endured voluntarily, when accompanied with penitence and restitution, may be accepted as an atonement for a crime. But does not the atoning virtue of the suffering consist in its voluntary and repentant character? How can suffering, inflicted by compulsion and borne with unrepentant defiance, atone for crime or serve to purge the offender of his crime?

However this may be, the dogma in effect produces the most pernicious results. It causes the immediate discharge of the convict upon the expiration of his allotted term of imprisonment, without the slightest regard to his fitness for freedom. It matters not how hardened or vicious the known character of the prisoner may be; he may even openly declare his fixed purpose to return to the life of crime; the state, by reason of this absurd theory of atonement, refuses to exercise any further constraint and turns the convict loose, knowing that he goes forth to be the scourge of the community. Was adherence by the government to a false academic dogma ever carried out to its extreme relentless conclusions with results so damaging to the people and with such criminal disregard of the plainest duty of protection owed by the state to its subjects?

The sole aim of the punitive system as embodied in the penal codes was to punish criminals and to so apportion the punishment to

desert as to make it in every case exactly and evenly retributive. But it was perceived long ago that this attempt to realize the conception of ideal justice could not possibly succeed if a uniform amount of punishment was attached to each defined crime. It was perfectly obvious that separate crimes, included under the same definition but committed by different persons under different circumstances, involved different degrees of guilt and hence deserved different amounts of punishment. In other words, it became clearly apparent that perfect retributive justice was absolutely unattainable by any possible penal code. Instead of abandoning the ideal, however, the codes were given a measure of elasticity. The admeasurements of guilt and of corresponding punishment were made approximate only, and the codes, instead of allotting an exact punishment, to each crime, used such expressions as (for example) "imprisonment for not less than five nor more than ten years" or "not exceeding twenty years." This throws upon the judge conducting the trial the real burden of computing the degree of the prisoner's guilt within the limits imposed by the code. The discriminations which the legislature could not possibly make are shifted to the presiding judge.

It is a cruel responsibility cast upon the judge, who is as powerless as the legislature to arrive at a just solution of the problem—to measure and weigh the guilt that rests on the soul of a fellow creature. The determining elements of that problem consist in facts and influences that have operated ever since, and even before, the birth of the prisoner in moulding his character and purposes; in circumstances that are no part of the *res gestae* attending the crime; in thoughts and intents of the heart that are locked up in the prisoner's breast. All these elements are unknown to the judge, and even many of those that may be accessible are rigidly excluded from evidence because not immediately and directly connected with the crime. What possible course is open to the judge, who must decide this momentous problem of human guilt, solvable only by the Almighty? He must be governed by the impression created by the prisoner's appearance and bearing and such meagre facts as are included in the testimony, throwing, or seeming to throw, a gleam of disclosure upon the prisoner's hidden character and purposes. Upon such superficial and undecisive incidents, and upon the force with which they happen to strike the judicial mind, hangs the amount of punishment meted out to the prisoner. The most conscientious judge cannot possibly do otherwise than render a hap-hazard sentence—it may be five years, it may be twenty years. Five years for one prisoner, twenty years for

another who is guilty of a similar crime; and the one who receives the longer sentence will (rightly or wrongly) have a rankling sense of injustice which will embitter all his subsequent life.

This burden of decision cast upon the judge involves another injurious consequence. The judge has an individual character and temperament, as well as the prisoner. One judge has a constitutional inclination toward lenity, a deep pity for human frailty, broad sympathy and charity; another is a severe and relentless judge of character, moved by an abhorrence of crime that is little tempered with mercy. Both judges may be animated by the same conscientious aim to act justly, and yet it is certain that the same prisoner will receive, if tried before one of them, a sentence of not more than five years and, if tried before the other, a sentence of not less than ten years. Add to this discrepancy the wide variation in the penalties for the same crime in the codes of the different states (as shown in the preceding chapter), and it is evident that there is no standard, no consensus of opinion, by which it is possible to make any practical approach toward equality in punitive sentences.

The ideal of equal and exact justice aimed at by the penal codes is unattainable; even partial or approximate justice the codes can never attain. The pretence of administering justice, while the real results are known to be grossly unjust, casts discredit and derision on the penal codes; the glaring uncertainty and inequality in the distribution of punishments make the name of legal justice a mockery. And thus the moral effect which the criminal law ought to have upon the public mind, by appealing to the sense of righteousness, is sadly impaired and almost destroyed.

This arraignment of the penal codes and the punitive system they embody is based upon facts that are universally known, and yet these codes and their system still retain their hold over a large part of the civilized world. Such is the tenacious strength of the human aspiration for justice, an unattainable ideal!

The just test of any institution is in its practical working and the effects it accomplishes. Has the punitive system served to repress or diminish crime? In the civilizing processes of the ages, crime has certainly decreased and there is reason to believe that it is still decreasing. There are innumerable forces, educational, philanthropic, Christian forces, that are successfully warring against crime. Is the punitive system of criminal law one of these beneficent forces?

Reference to a single fact will perhaps be accepted as a satisfactory answer to this question. Most of the convicts in the United

States who have served the term of their sentence in state prisons or penitentiaries, conducted as these prisons were a century ago, and as most of them are now conducted, on the punitive plan, return to a life of crime after their release. This is not true of all these convicts. The fact that some of them live within the law after their discharge may be explained, it is thought, chiefly by the circumstance that the treatment in the punitive prisons has one, and only one, reformative feature; that is, hard labor. Where a prisoner is kept steadily employed at industrial work, day after day and year after year, he acquires, perforce, the *habit* of labor. This habit thus formed has enough virtue in itself in some cases to sustain the discharged convict in a life of honest industry. What actual percentage of these convicts abstain from crime after release is a matter of estimate, but the highest claim made by the prison wardens in this behalf is twenty-five per cent. This figure suggests a simple computation. The total number of convicts now confined in the punitive, non-reformative prisons in the United States is approximately 80,000. The average term of sentence served is about four years, giving an annual discharge of 20,000. Assuming, as claimed, that one-quarter of these live a law-abiding life, the remaining 15,000 resume the life of crime. This 15,000 includes the most confirmed and desperate criminals in the United States; they go out from the prisons, acknowledged experts in crime, to become a terror to the community. Every year the prisons in the United States discharge upon the country this vast army of criminals, hardened and made more desperate by their prison life, to replenish and to lead the criminal class. And all this is done by reason of a blind subservience to the ancient and absurd theory that these ex-convicts have atoned for their crimes. Of all the agencies and influences that tend to the increase of crime in the United States, it is safe to declare that the penal codes and the punitive system of the criminal law, inheritances from the middle ages, are the most potent and insidious

CHAPTER V

THE INDETERMINATE SENTENCE

AMONG the false assumptions involved in the penal codes the primal assumption, underlying all the others, is that which defines the function of the state in relation to crime Originally, the state, we have seen, became the "avenger of crime." That conception, somewhat modified, is still embodied in the codes. They assume that the whole duty of the state with reference to the criminal is discharged by the infliction of retributive punishment. They aim at an ideal, but unattainable, *justice* in the treatment of the prisoner, and nothing more.

This is a very superficial and false view of the functions of the state. The state exists for the *protection* of the people. The state does not properly interfere with the operation of natural laws governing the development and the activities of the people, until something arises which obstructs their free operation and becomes, or threatens to be, harmful to the public weal. The aim of all rightful legislation is protection of the public against injury, against whatever is a menace to progress, liberty, peace. Crime is one of these injurious factors in the common life against which, as against contagious disease and homicidal insanity, it is the duty of the state to protect the people. The rightful object of all criminal law is public defence against crime. The state confines a patient having a contagious disease in a hospital, a violent lunatic in an asylum, a criminal in a prison; in each case it is dangerous to the community to allow the person confined to be at large, and the action of the state, in each case alike, is justified by its duty of securing the public safety.

These two distinct conceptions of the relation of the state to crime lead to results that are wide apart. The view embodied in the penal codes lays stress upon the treatment of the criminal; its keynote is retributive punishment; its ideal is to do exact justice to the criminal and, to attain this end, the effort is made to admeasure guilt and apportion punishment; but while effort is thus concentrated on the criminal, the codes, with their theory of atonement, lose sight of the duty of the state toward the people.

On the other hand, the broader and correct view of the functions of the state lays controlling stress upon the defence of the public against crime; public protection is its key-note, and it demands that the treatment of the criminal shall be subordinated, and if possible made conducive, to that main end. Under this latter view, the degree of the prisoner's guilt and even the exact academic definition of his crime become mere speculative and wholly immaterial questions. The fact that he has committed a crime, rendering it incompatible with public safety that he should be at large, makes it the duty of the state not only to put him in prison but to keep him in prison until it becomes consistent with public safety to set him free. But how long then shall the imprisonment last? The plain and convincing answer is—until the prisoner becomes fitted for freedom.

It is for the obvious interest of the convict, and of the public as well, that he should be transformed in character and be fitted to live an honest and law-abiding life, and that this result should be accomplished in the shortest possible time. But can this result be accomplished at all, and how can it be accomplished? Is this result as visionary and unattainable as the ancient ideal of retributive justice has proved to be? The punitive system, by the experience of centuries, has demonstrated that mere imprisonment has of itself no reformative influence; on the contrary, the association and the stern discipline in the punitive prison have generally produced a hardening and demoralizing effect. That the convict should reform himself, without any uplifting aid, without any outward source of encouragement and hope, is well nigh impossible. How, then, can the prison life fit him for freedom?

The modern system of reformatory treatment, that may be said to owe its origin to the genius of Z. R. Brockway, the founder and for many years the superintendent of the state reformatory at Elmira, New York, has been adopted and is now administered in a considerable number of prisons in the most progressive states of the Union. The various agencies and methods which have been scientifically developed by experiment and are embodied in this system of training and discipline, are rather subjects of practical administration than of legislation, and are therefore outside the scope of the present writing. It is sufficient to state here, in a summary way, the results accomplished. The reformatory system has been applied, until very recently, only to the treatment of first offenders and, generally, to those under thirty years of age. Its application is now being extended, tentatively, to state prisons, which have heretofore been

conducted under the punitive plan, and it is believed that the system can be successfully adapted to all prisons and to all prisoners convicted of crime.

As to the results obtained by this reformatory system, it must be remembered that the danger of a relapse into crime is most acute in the months immediately following the convict's release from prison. The sudden removal of restraint is apt to cause a reaction; the difficulty that the convict experiences in readjusting himself to the changed conditions of freedom, and the temptation, arising from that very difficulty, to return to his old mode of life, press hardest upon him at the beginning. It is the first step that costs. If he exhibits sufficient strength of purpose to stand firm against the shock of the first rebound; if, at the end of six months, he has become established in industrial occupation, has avoided evil associations and is determined to live honestly; has he not endured the severest test? Is it an unfair presumption that he has really entered upon a new life and that he will hereafter retain both the purpose and the ability to abstain from crime? The men from the Elmira Reformatory have been subjected to this crucial test and its statistics show that eighty per cent of them have stood the test successfully. This reformatory system of prison treatment has now become firmly established as an institution in the United States, and present tendencies indicate that it will ultimately gain universal prevalence throughout the country.

The length of time required by such reformatory treatment to fit a convict for freedom can be determined only by actual trial in every case; it is purely a question of individual character and temperament, and bears no relation to the crime committed. Manifestly it cannot be measured by a term fixed in advance. The convict resists and is naturally hostile to reforming influences; until he yields himself to them and co-operates with them, no beneficent result can be attained. But if he is confined under a definite sentence for a fixed term, the knowledge that he will be absolutely entitled to his discharge in any event at the end of the term, encourages him to maintain an attitude of defiant resistance to all reforming influences. The definite sentence is, therefore, distinctly adverse to reformation; adverse to every effort toward fitting the convict for freedom.

To meet the demands of a reformatory system and to obviate the evils of the punitive system, the indeterminate sentence has been devised. By this, the person convicted of crime is to be sentenced to imprisonment for no specified term, but to remain in confinement and under reformative treatment until he becomes fit for freedom.

This form of sentence logically involves not only the reformatory system with all its approved appliances and methods for developing in the prisoner correct principles and habits, but also in every case constant observation and a minute personal record, together with applied tests, showing the steps toward progress and toward relapse. In this way, the career of each convict, the development of his character and purposes, his power of self-control, will become so far revealed to the officers of the prison and to the Board of Parole that the question whether he has attained fitness for freedom can be determined with a prognosis not less reliable and confident than that with which (for example) a lunatic is declared to have regained his sanity. The prisoner, knowing that his discharge is dependent on his own exertions, will be impelled by the longing for liberty (the most effective of all possible incentives) to surrender himself to the uplifting influences that surround him. And the discharge when earned by the prisoner is a conditional one; he goes at once to a place where employment has been secured for him, and the state extends its protecting care and supervision over him through a period of parole. During this period (usually six months or a year) he is required to render monthly reports made by himself and his employer showing the amount of his earnings and the character of his work. At the end of this period, if he has demonstrated his ability and purpose to lead an honest life of self-support, he receives an absolute discharge. But if, during the period of parole, he commits a crime or falls into evil ways or among bad associations, he is re-arrested and returned to the reformatory for further treatment.

The theory of the indeterminate sentence seems to have attained at last the ideal of justice, after which the criminal law has for ages been vainly striving. Justice to the people, by protection against crime; and to the criminal, not only justice but mercy in the form of Christian beneficence. Imprisonment for a fixed term under the old punitive system yields only temporary protection to society, lasting until the expiration of the term, when the original danger is revived in an aggravated form. The indeterminate sentence makes the protection permanent. Reformation of the convict, therefore, becomes the highest and ultimate aim of imprisonment, for nothing but reformation or continued imprisonment can absolutely secure the public against his depredations.

The indeterminate sentence reverses the attitude of the state toward the criminal and hence tends to reverse the attitude of the criminal toward the state. Under the punitive system, the convict

regards the state defiantly as an avenging fury, inflicting upon him pain and suffering and finally casting him out with threatenings for the future. Under the reformatory system, the idea of punishment is kept in the background and the state presents itself to the convict as a beneficent power aiming to effect his rehabilitation and to aid him in becoming worthy of freedom.

The indeterminate sentence is not applicable to all crimes. It ought not to be applied to those gravest crimes, denominated capital crimes, which do irremediable and deadly harm. For the decision that a convict is fitted for release, like the decision that a lunatic has recovered sanity, may be quite correct at the time when rendered, but in neither case is it possible to guarantee that there will be no relapse in the future. The most that can be affirmed regarding the permanence of the cure in any case is that there will *probably* be no recurrence of the malady. This probability does not over-balance the mere possibility that one who has once committed a deadly crime may be capable of repeating it; the danger to the public is too great to justify the risk of releasing him.

On the other hand, for a wholly different reason, there may be a question whether the indeterminate sentence can justly be applied to all the minor crimes and petty misdemeanors. The reformatory treatment has proved effective upon the great majority of the convicts subjected to it, and its success appears to bear little relation to the gravity of the crimes they have committed. But some convicts have always proved unresponsive to reformative influence and are apparently incorrigible by any form of human instrumentality yet discovered. If all such convicts without distinction were held under the indeterminate sentence, they would be kept in confinement during life. The logical principle of this sentence is, no release, except for those who are fit for freedom; and if the original offense was such that public protection justified the imprisonment of the offender, the same reason demands the continuance of the imprisonment until the prisoner has undergone such a change of character as gives reasonable promise that if set free he will not again commit crime. If the crime committed is one that imports serious danger to the community, the logic of the indeterminate sentence is unanswerable. There is no justification to the state in turning loose upon the people a felon who has proved impervious to all reforming influences and agencies and who is sure to resume his previous life of depredation and crime until he is again caught and imprisoned. Such a

convict can complain of no injustice to himself if he is held in permanent confinement, and in no other way can the public be effectively protected.

But in the case of petty misdemeanors, the situation presents a different phase and is more difficult of solution. These offenses import, not serious danger but rather inconvenience and annoyance to the public. If the offender is committed under the indeterminate sentence, he is quite as likely as a felon is to resist reformatory treatment, and he may consequently be held in prison during his lifetime. Here, again, the logic of the indeterminate sentence is inexorable. The people are entitled to protection against minor, as well as graver, crimes; the laws must be enforced; it is an absurdity to put a misdemeanant in prison and then, after a brief term, to release him, with the assurance that he will immediately commit the same, or a more flagrant, offense. Short sentences often repeated for petty offenses serve no useful purpose and are distinctly injurious.

On the other hand, it is a most serious matter to deprive a human being of liberty by a life-long imprisonment; only urgent necessity justifies the state in resorting to so extreme a measure. Take the crime of "drunkenness and disorderly conduct;" it is the most common offense brought before the inferior courts and the most difficult one to dispose of satisfactorily. If habitual drunkenness is a disease, it should be treated as such; the drunkard should be committed to a retreat as a patient for medical treatment until cured. If the disease proves incurable or the habit unconquerable, why should it seem more unjust to confine the patient for life than to keep an incurable lunatic in an asylum for life? With this, as with many other misdemeanors, there is the practical difficulty of procuring any verdict of guilty from a jury, if such verdict entails the possibility of a virtual life sentence against the prisoner. Moreover, there is the serious question whether these minor offenses *do* constitute such a menace and danger to the community as to justify the state in resorting to a remedy so drastic and extreme as a condemnation of the offender to what may be life imprisonment. It may be that the reformatory system of treatment (which is now in a stage largely experimental in this country) will be so perfected in the future that it may become expedient and just to bring all crimes under an absolutely indeterminate sentence.

Imprisonment, however, is not always the best, or even a desirable, form of treatment for habitual inebriety. Unless the confinement, with enforced abstinence, is continued for a sufficiently

long period to overcome the passion for strong drink, imprisonment will hardly exert any curative effect, while its deterrent influence is almost negligible. There are instances, as already stated, where medical treatment in a sanitarium or inebriate asylum presents the hope of effecting a cure. In many other cases, not so inveterate, a suspension of sentence committing the offender to the charge of a probation officer has produced good results. In Chicago and St. Louis this latter course has been adopted with the condition that the culprit sign a pledge of total abstinence for one year, and the effect of the system in the two cities is favorably reported.

The chief difficulty in applying the indeterminate sentence to minor offenses consists in the fact that in an obdurate case it may be a life sentence. This difficulty disappears when the sentence is qualified by imposing a maximum limit to the possible duration of the imprisonment; and if the maximum limit is made large enough, the indeterminate sentence thus limited seems the best possible treatment for misdemeanors and minor offenses generally. It does away with the evil of short, repeated sentences, and goes as far as public sentiment at the present time will approve.

The indeterminate sentence has been received by the people with such favor that it is now incorporated, in modified forms, in the criminal jurisprudence of many states of the Union. In all these states, however, it is qualified by confining its operation between a minimum and a maximum limit. Although it is hard to regard such limitation as logically defensible, there is much to be said in favor of it from a practical point of view.

The plan of the indeterminate sentence had its origin here within the present generation; it was not only new to the people but its principle was in conflict with those fundamental conceptions of retributive punishment upon which the whole criminal law had rested from time immemorial. The inherited idea, that justice demands that the duration of the imprisonment be governed by the gravity of the offense, was so firmly implanted in the public mind that it is difficult to eradicate it. It will still require time to educate public opinion to full acceptance of the belief that the true aim of imprisonment is not to inflict retributive suffering upon the prisoner, but to make him fit for freedom; that the imprisonment should continue until that aim is accomplished, no matter now long it may take, and no matter what the prisoner's crime may have been; that, in perfect analogy to a hospital or an insane asylum, a prison is only a sanitarium where every inmate must be retained and treated until he is cured

and can safely be discharged. The indeterminate sentence without limits cannot be adopted, in fact, until these beliefs have supplanted the ancient ones and have become thoroughly grounded in the public mind. Moreover, the indeterminate sentence presupposes an effective reformatory system of treatment, with tests and means of accurately judging results accomplished in each individual case. Until all these have been developed by experiment to a high degree of scientific efficiency, it is perhaps quite as well that the maximum limit should be retained.

Graver objections have been made to the minimum, than to the maximum, limit. The prisoner is informed at the outset that it is possible for him to earn his discharge within the minimum term, say two years. He and his friends look forward to the expiration of the two years as the date when he will be set free, very much as if he had received a definite sentence for two years. This anticipation (it is said by prison authorities) relaxes his efforts and goes far to neutralize the virtue of the indeterminate feature of the sentence; and when the two years have elapsed and the prisoner's record does not justify his release, he is apt to regard his further detention with a sense of injustice as if it were a new sentence or an extension of his original sentence.

The principle of the indeterminate sentence so appeals to the sense of justice, and the attachment to it of a maximum limit so disarms the inherited popular prejudice in favor of a fixed sentence, that the danger now threatening the country is, not that this indeterminate form of sentence may be neglected, but that it may be too generally adopted and prematurely applied before the prisons are adapted to receive it. It seems perfectly obvious that the indeterminate sentence is the complement of a reformatory prison system; of a system which not only effects reform, but furnishes tests and evidences of what it has accomplished in each individual case. In disregard of this plain precedent condition, a tendency has become manifest to apply the indeterminate sentence to all prisons indiscriminately. To condemn a convict to imprisonment in a state prison conducted upon the old punitive plan, without any reformative or uplifting agencies, except possibly hard labor,—and nearly all the prisons in the United States are still conducted upon that ancient plan,—and to command him to fit himself for freedom as the condition of his release, is a cruel mockery. The parole boards, moreover, are often composed of men who have no proper understanding of the importance or the nature of their duties; they are apt to pass

upon the applications for discharge that are submitted to them, in a hasty and perfunctory manner, with the inevitable result that prisoners are released who are wholly unfitted for freedom and speedily relapse into crime. Both these causes—the administration of the indeterminate sentence in non-reformative prisons and the incompetency of boards of parole—not only serve to impair the usefulness of this form of sentence but tend to bring the sentence itself into disrepute. There is now very serious danger that the value of the indeterminate sentence as a powerful auxiliary to reform may fail of recognition and the sentence fall into discredit, by reason of the improper uses to which it is being subjected.

The validity of the laws establishing the indeterminate sentence has been repeatedly assailed in the courts upon constitutional grounds, but unsuccessfully in every instance except one. The grounds of attack have been that such laws violated the state constitutions in the following particulars: in vesting judicial power in the boards of parole, which are given authority to discharge the convict; in encroaching upon the governor's constitutional power of pardon and vesting such power in the parole board; in depriving the court of all discretion in fixing the term of imprisonment; in depriving the defendant of the right of a Common Law jury trial; and in inflicting a cruel and unusual punishment. (*George v. People*, 167 *Illinois R.* 447; *Miller v. State*, 149 *Indiana R.* 607; *Skelton v. State*, 149 *Indiana R.* 641; *Wilson v. State*, 150 *Indiana R.* 297; *State v. Peters*, 43 *Ohio St. R.* 629; *Commonwealth v. Brown*, 167 *Massachusetts R.* 144; *Conlon's case*, 148 *Massachusetts R.* 168.) The one exceptional instance, mentioned above, in which this form of sentence was held to be unconstitutional, was the case of *People v. Cummings*, decided in the State of Michigan in 1891 (88 *Mich. R.* 249). The decision was rendered nugatory, however, by the prompt action of the people of the state in so amending the constitution of Michigan as to meet the objections upon which the decision rested; and in 1903 a new indeterminate sentence law was enacted in conformity with the new constitution. It has been held in several states that a statute establishing the indeterminate sentence properly applies only to offenses committed after the enactment of the statute, and that if applied to prior offenses it would be an *ex post facto* law. (*Johnson v. People*, 173 *Illinois R.* 131; *Murphy v. Commonwealth*, 172 *Massachusetts R.* 264; *People v. Dane*, 81 *Michigan R.* 36.)

The attack upon the indeterminate sentence law of Illinois was carried to the Supreme Court of the United States upon the claim

that the law was repugnant to the 14th amendment of the United States Constitution, which declares that no state shall "deprive any person of life, liberty or property without due process of law." The Supreme Court sustained the constitutionality of the law. (*Dreyer v. Illinois*, 187 *U. S.* 71). This decision rendered in October, 1902, will probably be accepted as having definitively settled the legality of the indeterminate sentence.

The indeterminate sentence, unhampered with either minimum or maximum limits, has never been tested. These limits seriously impair its effectiveness, but the time is not yet ripe for their removal. When the reformatory system of prison training and discipline shall be further perfected (and rapid progress is now making in that direction), and such system shall have become established in all prisons throughout the United States, public opinion may demand the universal adoption and enforcement of the indeterminate sentence in its absolute form. This is not a visionary anticipation. The tendencies of the present are flowing with a strong current in favor of the development and extension of a reformatory prison system; the danger is that the current flows so strongly in favor of the indeterminate sentence that states may adopt it prematurely before the prisons and their officers are fitted to administer it.

If in the fullness of time the conditions shall justify the use of the indeterminate sentence, unlimited and absolute, it is difficult to overestimate its efficacy as an aid to reformation and as a means of protection to the public against crime. It applies to the prisoner the strongest possible incentive to submit himself to the benign influences surrounding him, and by their aid, to work out his own salvation. It opens to him one single and only path to freedom. The release from prison of an unregenerate criminal is a bane to the public, but it is a far greater curse to the criminal himself; enslaved by appetites and passions that are evil, without power of self-control, unable to withstand temptation, he needs the constraint and guidance of a strong arm. To withdraw that constraint by setting him free is to abandon him to evil forces that will drag him to greater depths of crime. There is no more fatal doom for such a criminal than freedom. The indeterminate sentence defends the criminal from his worst enemy, himself, aims to awaken hope, to develop character, to infuse strength, to purify, elevate, re-form the whole man; and thus it embodies the very spirit of the teachings and life of the Savior of men.

CHAPTER VI

CHILDREN'S COURTS AND PROBATION OFFICERS

AMONG the contributions made by the United States toward the development of the science of penology upon practical lines, there are four of signal value and importance. These are (1) the Elmira system of reformatory discipline and training; (2) the indeterminate sentence; (3) children's courts, and (4) the institution of probation, with probation officers. The first of these is the product of prison administration rather than of legislation, and is not therefore included within the scope of the present work. The indeterminate sentence has been treated in the preceding chapter. The two remaining subjects, children's courts and probation, are claimed as American institutions; whether or not one or both of them originated in the United States, in the sense that here they preceded everything of an analogous character found in any other country, they have become so firmly established and so extensively used in the United States that they now constitute very distinctive features of American jurisprudence. The usefulness of both these institutions depends vitally upon the spirit and the methods of their administration; but it is proposed in this concluding chapter, to consider only the *laws* governing their creation and regulation.

At Common Law, the age below which a child was held incapable of committing crime was fixed at seven years; and Blackstone cites a case where a boy eight years old was convicted of arson and hanged. Between the ages of seven and fourteen, a child, though regarded as not incapable of committing a felony, was judged "by the strength of the delinquent's understanding and judgment." But when a child reached the mature age of fourteen, the Common Law held him to the same degree of responsibility as an adult for felonies committed. The rigor of the law might in fact be softened by the humane temper of a judge inclined to mercy, but the Common Law relating to felonies made no distinction of persons among those over fourteen years of age.

It seems almost incredible that these medieval views of childhood, embodied in the Common Law, should find expression in any

penal code of the twentieth century. But the provisions of the penal code of the progressive state of New York regarding the criminal responsibility of children are the following:

> Sec. 816. A child under the age of seven years is not capable of committing crime.
>
> Sec. 817. A child of the age of seven years and under the age of twelve years, is presumed to be incapable of crime, but the presumption may be removed by proof that he had sufficient capacity to understand the act or neglect charged against him and to know its wrongfulness.

This code is even more rigorous than the Common Law, as it reduces from fourteen to twelve years the limit of age within which a child is presumptively incapable of crime. A child above the age of twelve years stood on the same footing as an adult, inasmuch as the sections above quoted were, until 1894, the only provisions on the subject contained in the code. In 1894, an act was passed providing that when a child under the age of fourteen (since raised to sixteen) was charged with a crime, other than a capital crime, which if committed by an adult would be a felony, the child could be tried as for a misdemeanor. From this exception of a capital crime, it follows that there is nothing in the law of New York at the present day to prevent the conviction and execution of a child eight years old for murder.

Before the enactment of the laws creating children's courts, the judges, upon the trial of children for crime, were often constrained by the mandatory language of the codes. Where the code declares that the commission of such and such an act *by any person* constitutes such a crime and fixes its penalty, and directs that the magistrate before whom the trial is had *shall impose* the penalty prescribed by law, the only question before the court is whether the child has in fact committed the act defined, with knowledge of its wrongfulness. If the evidence has answered that question in the affirmative, the magistrate, however merciful his impulses and however tender the age of the child (provided it is over seven), is apt to regard the code as leaving nothing to his discretion, but imperatively commanding him to impose the penalty it prescribes; and to fear that by failing to do so, in the case of a child just as in the case of an adult, he would himself be guilty of a violation of the law.

There were other matters equally important in which the judge had no power of discretion. The accused child often had to be committed to the common jail while awaiting trial; the law provided

no other place of confinement. If convicted and sentenced, the child generally had to be imprisoned in the jail or the penitentiary, in common with old and hardened criminals. In a word, the codes were no respecters of persons; their procedure, their crimes and their punishments, all related simply to "persons"—a child was a person—and the codes practically ignored the existence of any essential difference between a child over seven years of age and an adult.

It was the tardy recognition of the distance that separates the child from the adult that led to the creation of children's courts. Perhaps it would be too much to say that a criminal less than sixteen years of age is an impossibility. There are rare instances of abnormal development which, in the apparent absence or atrophy of the moral sense, rapidly converts a mere child into a prodigy of wickedness and crime; but even in such cases, the cause can generally be traced to an exceptionally vicious environment. But generally the act of a child, which if done by an adult would constitute crime, hardly deserves so severe a name. The child may, and usually does, know that the act is wrong, but he has no adequate realization of its wrongfulness or of the reason why it is wrong; he often lacks the experience and the judgment to discriminate between an act that is merely mischievous and one that is unlawful. A child is essentially imitative and is apt to do what he sees his elders doing, without thinking whether it is right or wrong. The moral sense in a rudimentary form appears very early in life, but its development, together with that of the other reflective faculties, is slower than the development of the emotional nature; during the period of childhood, the imperative of conscience is generally feeble. Hence it is that the primary formation of character is largely the product of the atmosphere and external influences surrounding the child, the conscience and reason not having yet grown strong enough to cope with the environment.

The Common Law methods of dealing with delinquent children as if they were adults are extremely harmful; in the case of adults those methods are execrable, but when applied to children they are infinitely worse. Especially, the system of confining the children in the common jail while awaiting trial and, after conviction, of herding them with old and confirmed criminals in a punitive prison, is inevitably one of education in vice and crime. The vile infection of the place acts upon the receptive mind of the child with poisonous effect; he comes out of the prison branded with the name of criminal and yet made proud of the name. It is only in exceptional cases that

such an experience fails to corrupt and pervert the child's aspirations and ideals; his whole moral nature has been deformed.

It is strange that such evils were allowed to prevail for centuries in the light of Christian civilization. The first radically effective measure for their correction in this country was an act of the legislature of the state of Illinois in the year 1899 creating a "juvenile court." The humane character and practical value of this step met with instant recognition throughout the country, and the example of Illinois was speedily followed by other states until now nearly every state in the Union has established its juvenile courts or at least a system of juvenile probation.

The Illinois Act of 1899 was entitled "An Act to regulate the treatment and control of dependent, neglected and delinquent children," and applies to male children under seventeen years of age and to female children under eighteen.

The following is a condensed summary of the act as subsequently amended: it vests jurisdiction, in all cases coming within the terms of the act, in the circuit and county courts of the state; and the judges of the circuit court, in each county having over 500,000 population, are directed to designate one or more of their number to preside over the juvenile court. Any reputable resident of the county having knowledge of a child in the county who appears to be either neglected, dependent or delinquent (as these terms are defined in the act) can file in the court a verified petition setting forth the facts. A summons is then to be issued requiring the person having custody of the child to appear with the child before the court. The parents, guardian, or some relative of the child are to be notified of the proceedings, and the attendance of the persons so summoned and notified can be enforced, if necessary, by warrant. The court then proceeds to hear and dispose of the case in a summary manner. Pending the final disposition of the case, the child may be retained in the possession of the person having charge of the same or be kept in some suitable place provided by the authorities. The court is authorized to appoint probation officers, one of whom shall be present when the child is brought before the court; shall make investigation of the facts and shall represent the interest of the child when the case is heard, furnishing such information and assistance as the judge may require; and after the trial such probation officer shall take such charge of the child as may be directed by the court.

The court, if it finds the child to be neglected, dependent or delinquent, may allow the child to remain in its own home, subject

to the friendly visitation of a probation officer. But if the court finds that the child's parents or custodian are unfit to care for it, and that it is for the interest of the child and the public that such child be taken from the custody of its parents or custodian (or with the parents' consent), the court may appoint some reputable citizen as its guardian and direct such guardian to place the child in some family home, or the court may commit the child to some institution or school fitted and accredited for that purpose. In the latter case some officer of the institution or school is appointed guardian to care for and educate the child. The court may in its discretion, in case of a delinquent child, permit such child to be proceeded against according to the laws governing the commission of crimes or violation of ordinances. The court may order the guardian to place the child in a hospital for treatment when the child's health requires it. Guardianship under the act shall not continue after the child reaches the age of twenty-one years, and may be sooner discharged. The separation of the child from its home is to be continued no longer than is demanded by the child's welfare. The guardian is required to make reports to the court, which has the power to remove him and appoint another in his stead, or to remove the child from one institution to another or to restore it to its parents.

Whenever a child is arrested, it is to be taken before the juvenile court, which shall dispose of the case as if the child had been brought in upon petition. No child under twelve years of age shall be committed to a jail or police station, but such child, if unable to give bail, shall be kept in some suitable place provided by the city or county outside the enclosure of any jail or police station. Any child sentenced to an institution to which adult convicts are sentenced shall not be confined in, or brought into, the same building, yard or enclosure with such adult convicts.

The act contains provisions requiring the board of public charities to inspect and supervise the institutions for the care of dependent, neglected or delinquent children, and such children are to be committed only to institutions approved and accredited by said board. The act gives power to the court to authorize the legal adoption of the child upon the consent of the parents, but the court can make the order without consent if both the parents are unfit to have the child. The court has power also to inquire into the ability of the parents of any child neglected, dependent or delinquent, to support such child and, if it finds that they are able, to enter and enforce

such decree as may be equitable. The concluding section of the original act was as follows:

"This Act shall be liberally construed, to the end that its purpose may be carried out, to wit: that the care, custody and discipline of a child shall approximate, as nearly as may be, that which should be given by its parents and, in all cases where it can properly be done, the child be placed in an improved family home and become a member of the family by legal adoption or otherwise."

The act was supplemented by a further law in 1905, which enacted that the parents, guardian or custodian of any dependent, neglected or delinquent child or any other person who should knowingly do any act that directly contributed to the conditions which rendered the child dependent, neglected or delinquent, or who, having custody of the child, should, when able to do so, neglect to remove such conditions, should be deemed guilty of a misdemeanor, subject to fine and imprisonment; the court was empowered, however, to suspend sentence and release the defendant on probation for one year upon a recognizance conditioned that the defendant should provide and care for the child as directed by the court.

These laws of the state of Illinois have been set forth with some detail because in their substantial features they have been generally followed by the other states which have established juvenile courts. There have, however, been variations from the standard set by Illinois, some for the better and some for the worse.

The limitation of the age of children under jurisdiction of the juvenile court originally fixed by the Illinois statute was "under sixteen"; but this has been, by subsequent amendment, enlarged to seventeen years in the case of boys and eighteen in the case of girls, as stated above. This limit is higher than in most of the other states, except Utah where it is fixed at eighteen years for delinquent children of both sexes, and Michigan where, it would appear, any "minor" may be adjudged a dependent or neglected child. In most of the states the limit is set at sixteen years of age for both boys and girls. The limitation at twelve years as the age under which children shall not be confined in any jail or police station is much too low; the highest limit set by any state in this regard is seventeen years in Iowa and the District of Columbia. It would seem that no child under the age of twenty-one years ought to be confined in any jail or police station; and many of our jails and police stations are in such a condition that no one over the age of twenty-one, either, ought to be confined in them.

The Illinois statute applies to all children within the prescribed age (except those who are inmates of correctional institutions) irrespective of the nature of the charge that may be brought against them. In some of the states an exception is made of children who are charged with a crime punishable by death or by life imprisonment. And most of the acts creating juvenile courts empower the judge in his discretion to send any case to the criminal courts to be disposed of in the regular course of procedure.

The laws of Illinois make the juvenile courts parts of the circuit and county courts. The circuit and county courts have general and original jurisdiction in law and equity. In some of the states a new special court has been created, designated the "Juvenile Court." In a very few states, the juvenile court has been made a branch of a court having only criminal jurisdiction. The manner in which the juvenile court should be constituted and the question whether it should be regarded as a *criminal* court are matters of the most vital importance. Their solution depends upon the conception entertained regarding the proper aims and the essential functions of a children's court.

The judge of one of these courts has expressed his view of the purposes for which his court was established as follows:

"To save children from lifelong consequences of childish errors; to check their feet at the very entrance of the downward road; . . . to let them expiate a fault at their own homes under the surveillance of kindly probation officers and to accomplish these ends without the publicity that tends to blast later attempts at well-doing, as well as to save young souls from the taint of contact with matured criminals."

The practical value of such a court is more by way of prevention than of punishment. The child is taken at that plastic age when (some one has well said) "formation" and not "reformation" is the end to be aimed at. What is most carefully to be avoided is the treatment of the child as a criminal. If the children of the vicinage come to regard the juvenile court as a criminal court and brand as a criminal every child who is brought under its ministrations, its usefulness will be sadly impaired. Its true function is to appeal to the child's better nature, to develop self-respect and self-control, to exert a firm but kindly restraint, to awaken worthy motives by sympathetic encouragement. There are cases, of course, which demand rigorous treatment, but in most instances better results will follow gentler methods. Throughout the whole community the

juvenile court should be looked upon as a beneficent child-saving institution, not at all as a Draconian tribunal for the punishment of children.

The wisdom, then, is apparent of making the juvenile court a branch of an established court that has civil jurisdiction, general jurisdiction in law and equity. Its powers should be of the broadest kind, and occasion may well arise for the exercise of the functions pertaining to a court of equity. Equity (as distinguished from law) takes special cognizance of domestic relations and has peculiar care over the rights of children. A court of equity holds all minor children brought within it as its special wards. Every case coming before the juvenile court involves the parents (if there are any living) as well as the child; the child cannot be treated or even considered apart from his parents and his home. Whether it is a neglected or a delinquent child, he has generally been made such through some fault or neglect of his parents; and, in order to deal properly with the child, it is imperative that the court should have power to deal with the parents. It should have power to arraign the parents and to coerce them in the performance of their duty toward their children. This often involves the surveillance of the home and its rehabilitation, to make it an abode fit for the growing child. But where the home conditions are essentially debasing, the juvenile court must have the power to take the child away from its parents and place it under influences that are healthful for both the body and the soul.

The child may be subjected to corrupting tendencies outside the home. It may be in contact with older persons who are exerting a hurtful influence and leading the child into vicious ways and habits. The juvenile court needs the power to protect the child by haling before it all persons, whoever they may be, whose association with the child is proved to be baleful, by holding such persons to a stern accountability, and by subjecting them to most drastic treatment in order that their corrupting influence over the child may be stopped. It may well be that neither the persons thus dealt with nor the parents may have been guilty of any statutory offense under the criminal law that would bring them within the jurisdiction of a criminal court; it needs a court of plenary power, with all the resources of chancery jurisdiction, that can throw its protecting arms around the child and effectually shield it from harm.

These ends were reached in the legislation of Illinois; first, by making the juvenile court a branch of an established court invested with original and general jurisdiction in law and equity; and sec-

ondly, by the supplementary act (abstracted above) which empowered the court to punish the parents or any other person who, by act or by neglect, were accountable for the conditions which rendered the child dependent, neglected or delinquent. Most of the states which have established juvenile courts have shown the wisdom of following the example of Illinois in both the particulars mentioned. Some of the states, however, as above stated, have made the juvenile court a branch of an established court having jurisdiction over criminal cases only; and some of the states have confined the jurisdiction of the juvenile court to "delinquent" children only, leaving dependent and neglected children to the mercies of private charity and public institutions.

The usefulness of the juvenile court is, of course, dependent, in the largest sense, upon the personal character of its presiding judge; it demands peculiar, and indeed exceptional, qualities,—ability to comprehend the child's point of view and to enter sympathetically into the child's motives and feelings; power to win the child's confidence and to exert the personal influence thus gained with tact and wisdom; and over all, a disposition to temper justice with extreme mercy. These are qualities that the experience gained by a judge in an ordinary criminal court is not likely to develop. On the contrary, the judge is there brought into contact with the worst side of human nature where mercy may often mean weakness; his sense of duty must often compel him to stifle his sympathies, and the general attitude of mind in which a conscientious judge comes to regard the prisoners brought before him in the criminal court is profoundly different from the paternal spirit that ought to govern the judge who deals with children.

The exclusion of dependent and neglected children from the juvenile court, and the confinement of its jurisdiction to delinquent children only, as well as the establishment of that court as a part of a criminal court, appear to be unfortunate and mistaken variants from the Illinois precedent. Neglect is the germ of delinquency, and to remedy or cure neglect is the best preventive of delinquency. Private charity tries to cure neglect and to improve the home, but charity can issue no mandates that must be obeyed. In the last resort and when the case becomes extreme, public authority puts the neglected child into the poor-house or a public institution. The juvenile court is brought into immediate contact with the neglected home and can exert there its uplifting and renovating power with an authority that no other agency can command. All the juvenile

court laws recognize the fact that the home is the natural place where the child ought to grow up. These laws contemplate every effort to improve the defective home so that it shall be made a fit abode for the child; and it is only when all efforts have failed that the juvenile court as a foster parent takes the child away from its home and its parents and creates for him a more wholesome environment. This is one of the most valuable functions of a juvenile court, and it seems a pity that some states have restricted its jurisdiction to delinquent children.

But even the states which have made the juvenile court a criminal court and have confined its action to cases of delinquency, have been careful to segregate it from the other courts. In some states, the laws require a separate building, remote from the criminal courts, for the exclusive occupancy of the juvenile court; in others, the law directs that a separate room shall be set apart for the sessions of the juvenile court and has provisions for securing its privacy, for guarding from public knowledge the names of the children brought before it and from giving publicity to its proceedings in special cases. These provisions are prompted by a tender solicitude to save the children from the taint of any public disgrace. Nearly all the acts contain a rigid prohibition of the confinement of a child in any jail or police station; this, with other provisions in the acts, involves the necessity of providing buildings in which the children can (in case of necessity) be confined while awaiting trial, and industrial and training schools to which they may be committed when taken away from their homes.

The example of Illinois is followed in most of the states by allowing any reputable citizen to bring a case before the juvenile court; but a few of the states have restricted this right to the district attorney or a probation officer. By this restriction, every complaint receives some preliminary examination by a responsible official and the court is thus relieved from petitions that are baseless or frivolous or animated by malice only.

The juvenile court laws bear close relation to the child labor laws and the school laws regarding truancy. The child labor laws aim to protect children from excessive toil unfitted to their years. But it must not be forgotten that a child, as well as an adult, needs employment. It needs recreation and play, fatigue and rest, but sheer aimless idleness is fraught with danger. Systematic exercise of body and mind is the condition of healthy development; and vacuous idleness leads to moral degeneracy as surely as overwork results in

physical degeneracy. The compulsory school laws thus supplement the child labor laws.

In the city of Denver, the juvenile court is in constant communication with the public schools. Whenever a scholar comes before the juvenile court and is placed under probation, the authorities of the school which he attends are notified of the fact; and if on any day he fails to appear at school, his absence is reported to the court and the probation officer having the case in charge promptly sets out in pursuit of the truant. The teachers also keep the court informed of the school record of the probationers, giving details of their conduct and progress or failures. Occasional meetings are held where the judge meets the principals and teachers of the school with the probation officers, and they confer together regarding the needs of the scholars under probation and the special treatment best adapted to each case. In this way, the schools become a powerful auxiliary of the juvenile court. Similar relations might most advantageously be established between the court and the proprietors of factories or offices where children under probation are employed at work. Judge Lindsey of the Denver juvenile court is a man of very exceptional personal qualities which enable him so to win the hearts of the boys brought before him, that there is excited within them a sense of duty and loyalty; the boys themselves are thus transformed into co-workers with the court and in very many instances have been led to exert a most beneficent influence over their associates.

The juvenile court needs another auxiliary which is not provided by the laws of any of the states. The nearest approach to supplying this need is a provision contained in most of the juvenile court laws empowering the court to place a child brought before it in a hospital when the child's health or condition requires it. But there are many children, not needing hospital treatment, who do urgently need medical attention and care. Numerous cases of juvenile delinquency are traced to bodily defects or vicious practices which occasion ill temper, irritability and lack of control. Imperfect vision, decayed teeth, deranged nerves, disordered digestion, adenoids, malformations, with a thousand other ills to which flesh is heir, if treated in childhood, are often entirely remedied by medical skill; and thus, in very many instances, a vicious, stupid boy or girl is transformed into a bright, cheerful, exemplary child. Wonders have been achieved in this direction, even with adult subjects, in the Elmira Reformatory, by medical treatment, with baths, massage, diet, athletic exercise. The experiments made there afford a striking

demonstration of the possibility of brightening dull intellects and awakening dormant sensibilities by physical agencies. Every juvenile court ought to have a medical department; it is needed, not less than it is by a life insurance company, to furnish a basis of judgment and of prognosis in each individual case. Every child brought into the court should undergo a searching physical examination by a competent physician who should be an officer of the court; his report and his counsel would be an invaluable aid to the court in comprehending the case and in making intelligent disposition of it.

The most valuable and powerful instrument at the service of the juvenile court is one to which only incidental reference has thus far been made; this is the probation system. The consideration of it has been reserved to the last because the system applies to adults as well as to children and it is necessary to treat it in its two-fold application.

When a person is brought to trial and proved to be guilty of the offense charged, the court may proceed to pronounce sentence or, in the discretion of the judge, may suspend or defer the sentence and release the defendant on such conditions as may be imposed. This latter course is pursued, naturally, only in cases where there are mitigating circumstances and the judge has reason to believe that the defendant will not again commit an offense against the law and may safely be given another chance without further punishment. Such release under suspension of sentence has long been within the power of the criminal court and the practice has widely prevailed. Before the adoption of the statutes relating to "probation," the release on suspended sentence amounted practically in most cases to an unconditional discharge; because, whatever might be the conditions imposed, the court was without any adequate agency to follow the subsequent career of the defendant and to see that the conditions were performed. Often, it was only when the defendant committed another offense and chanced to be brought again before the same judge and his identity with the previous defendant happened to be recognized, that it became known that he had violated the conditions under which the clemency of the court had been extended to him; the suspended sentence was then revived and the defendant was sentenced and committed for the first offense. This situation made it difficult to know whether the suspension of sentence in any given case had proved to be advantageous or injurious; it was impossible to gain reliable data on which to determine under what circumstances sus-

pension of the sentence would be judicious and even whether the practice of suspending sentence at all was advisable. The need was pressing for an additional officer of the court, armed with authority from the court, to exercise supervision over offenders released on probation and to encourage them by friendly aid and counsel in their effort to lead an upright life.

The state of Massachusetts took the lead in this direction by passing an act in 1869, which required the governor to appoint a "visiting agent" whose duties were prescribed by the act. Whenever application was made for the commitment of any child, one week's previous notice of the hearing was to be given by the magistrate to the visiting agent who was required to attend at the hearing; if it then appeared to the magistrate that the interests of the child would be promoted by placing him in a suitable family instead of sending him to a reformatory, the magistrate might authorize the board of state charities to indenture the child or to place him in such family. It was made the duty of the agent to seek out families suitable for receiving such children and, generally, to visit the children and make monthly reports to the board of state charities. This act was confined to juvenile probation; but in 1878, Massachusetts enacted a law for placing on probation, under the care of probation officers, such adults charged with or convicted of crime as might "reasonably be expected to be reformed without punishment." This latter act was a local one applying only to the county which includes the city of Boston; but it was followed in 1880 by an act extending the probation system to all the other cities and towns of the state. The very successful results attending the operation of the system in Massachusetts excited interest throughout the country, and the example set by that state has led to the establishment of a system of probation with probation officers in more than three-quarters of the states of the Union.

The duties of a probation officer are substantially the same in all the states which have adopted the system. The first duty is one of investigation; whenever a person, adult or juvenile, is brought before the court, the probation officer must ascertain, from sources outside the person himself, all that he can learn regarding the occupation, habits, family, associations, the whole environment of the person in question. The information thus gained is indispensable in enabling the magistrate to make an intelligent disposition of the case; it is necessary through all the proceedings, both before and after the hearing, that the probation officer and the magistrate should

counsel together and keep in close touch with each other as well as with the probationer. When the hearing has been had, and the person accused and found guilty is released on probation, it is the duty of the probation officer to render such assistance as he can in securing employment for the probationer and to see to it that the conditions of his release are faithfully performed; he should try to get into sympathetic touch with the probationer and to influence him by kindly encouragement and aid to avoid evil associations and to lead a better life. The probation officer must report to the court from time to time upon the probationer's progress; and the probationer receives an absolute release when he has performed the conditions imposed by the court and has demonstrated his ability and his purpose to live within the law. But if the probationer proves irresponsive to the clemency of the court and persists in evil ways, the probation officer is empowered to arrest him and to bring him before the court where the sentence of condemnation, which had been suspended, will be pronounced and its execution enforced.

In administering the probation system, it is essential (especially in the case of adults) that the probationer should realize that he is under the power and the condemnation of the court and that the law cannot be violated with impunity; he should realize that the probation officer, though in the truest sense his friend, is invested with an authority which the probationer must obey and cannot resist. He should understand that probation does not mean judicial weakness, that it does not place him in the realm of mere moral suasion which he can defy, but that it holds him in a position where his passions and habits and tendencies which are evil *must* be subdued. The correction of his life is all that can save him from imprisonment and lasting disgrace. Thus the motive of deterrence is presented in its most imperative form.

Release on *probation* and release on *parole* have substantially the same meaning. Both imply a certain clemency by which an offender is released before he has the right by the letter of the law to demand his release; and in both cases the release is granted to test the offender and with the belief that he will abstain from crime. By accepted usage, however, the two words have distinctly separate meanings. *Probation* is applied only to persons released before imprisonment and then committed to the care of a probation officer. This may occur before sentence, the sentence being suspended, or after sentence, the execution of the sentence being suspended; but, in every case, before the offender is committed to prison. *Parole,*

on the other hand, is applied to persons committed to prison under an indeterminate sentence, or its equivalent, and released at some point between the minimum and maximum limits of the sentence. The use of probation officers to supervise and care for adult prisoners on parole has not secured general adoption. A discharged convict, however, coming out of prison after a long seclusion from the world, surely needs the kindly services and counsel of a friend to aid him in beginning life anew; and the need is quite as imperative as in the case of those offenders who are not burdened with the disabilities and the stigma that handicap an ex-convict. It is to be hoped that the probation system may be universally extended so that convicts discharged from prison upon parole may not be exposed unaided and alone to the reluctant mercies of the world, but may be committed to the care and supervision of a probation officer; that would give the ex-convict in his helplessness one responsible friend on whom he could lean for sympathetic encouragement and aid.

In the probation laws of some of the states, provision is made to enable probation officers to expend, when necessary, small sums of money for the relief of their probationers. While the expenditure of money in relief work should be sparing and limited, cases must often arise when the probation officer cannot possibly perform toward his ward the common duties of humanity without making some pecuniary outlay. Whatever restraint the law may put upon the probation officer in this regard, it is absolutely essential to the successful discharge of his duties that he should be provided with funds the disbursement of which must be left measurably to his discretion. Every probation officer should possess a character of such unimpeachable integrity that his account of "expenses" may be audited in a liberal spirit.

What other qualities are needed to make a successful probation officer? He must have force of character and a dignity in keeping with his official authority in order that he may command the respect of his ward. He must have a mind well balanced and a high moral sense, that he may prove a judicious counsellor. He must possess genial qualities and a sympathetic nature, that he may gain the confidence of his ward and be able to influence his conduct. It may well be asked how, with all these requirements, any person can be found willing to undertake, as a volunteer without remuneration, the arduous responsibilities of the probation officer. It is only because such a volunteer is animated by another essential qualification, a devoted spirit of altruism, the highest development of which

has been called the "enthusiasm for humanity." But the possession of this enthusiasm alone is far from being a sufficient qualification. There is many a person of most worthy and devoted, but wholly tactless, character whose ministrations as a probation officer, though governed by the very kindest intentions, would drive his probationer certainly to drink and possibly to murder. Perhaps the supreme condition of success for a probation officer is the possession of *tact;* for tactfulness really comprises most of the other qualifications—a sound judgment, a kind and genial temper, a knowledge of human nature, and skill in influencing men. It is obvious that the value of a probation system depends very largely upon the personal fitness of those who are appointed probation officers.

It becomes a question, then, vital to the whole system, In whom shall the law vest the power of appointing probation officers and what rules or tests shall be applied to govern their selection?

In some states, the laws provide that members of the police force may be selected and detailed to perform the work of probation officers in the several courts. This provision can hardly be dictated by any motive but that of economy; it saves the payment of salaries to probation officers. Policemen, in the eyes of the humbler classes and especially in the eyes of those who have lawless tendencies, are the ministers of judgment and not of mercy; they are avoided with fear and suspicion. An offender against the law would certainly be reluctant to accept a policeman as a "big brother." The office of policeman is essentially inconsistent with that of probation officer. The duties of the police lie in the detection of crime and the rigid enforcement of law; all their training and experience unfit them for the confidential and sympathetic relation of probation officer and ward.

The relative merits of volunteer and salaried probation officers have been debated with a resulting conflict of opinion. Where a person is willing to devote himself to rendering friendly service and aid to one in need, without hope of reward, it furnishes convincing evidence of such disinterested kindness as can hardly fail to be met with appreciation and grateful response by the recipient. The same service and aid coming from a salaried officer might be received with indifference as a mere official act which the officer was paid to perform. On the other hand, a volunteer, subject to the superior demands made upon him by his business and private affairs, may find it impossible to devote the time required, especially in cases of emergency, to meet the needs of his ward. The volunteer, moreover,

must necessarily lack the wide and varied experience which is gained by the officer who devotes his entire time and energies to the service and thus becomes a skilled expert. On the whole, the weight of authority appears to favor the employment of salaried officers, as necessary to secure the systematic organization and efficient conduct of the probation work. At the same time, the services of volunteers are not to be indiscriminately rejected; there are many special cases in which a competent volunteer may be able to effect results beyond the power of a paid officer.

The office of probation officer comes within the civil service laws of some of the states, which determine the eligibility of candidates by competitive examination. The examination consists of written answers to printed questions. A candidate may be able to describe glibly all the duties of the office and the qualifications needed to make a good officer, and yet may not himself possess the personal qualities essential to competency. It is difficult to believe that any written examination can be devised which will afford a reliable method of selection. It is a question of personal qualities and of individual character and experience, far more than of mental attainments. If the examination should be conducted with the aid of persons experienced in probation work and supplemented by oral examination, it is possible that satisfactory results might be obtained under the civil service rules. But a better mode of selection seems to be through the action of a local probation board, as the subject will be treated later.

In most of the states, the power of appointing probation officers for the court in which they are to serve is given to the judge or judges of that court. There is the danger attaching to all judicial appointments, that they may be treated as a matter of patronage and political preferment. This danger is more imminent in the criminal than in the civil courts, because the selection of criminal judges is generally apt to be governed by personal influence and political expediency to a greater extent than is the selection of candidates for the higher civil courts. It cannot be denied that, while there are many criminal judges of the very highest character and ability, there are some judges presiding over the lower criminal courts who are wholly unfit to be trusted with the appointment of probation officers. But it is an objection, perhaps even more serious, to this mode of selection by judicial appointment, especially in large cities having numerous courts with varying jurisdiction and practice, that each court becomes a law unto itself; the probation officers of each court, governed

by the special rules of that court, are brought into no relation with like officers of other courts. The result is segregated effort; lack of system, lack of developed progress, lack of inspiration, needs that can be supplied only by centralized organization.

The probation work that is scattered over a large city should be co-ordinated and unified by being brought under the supervision of a central city board of probation. The members of such board should be versed in the principles of penology, and possess a comprehensive knowledge of the approved methods in conducting charitable and philanthropic enterprises; more than that, they should have had practical experience, through personal engagement in benevolent work, to give them a sympathetic understanding of the objects and the needs of the probation system. To this municipal board of experts could safely be intrusted the selection and appointment of probation officers for the city. Under the supervision of this board, the probation officers should hold periodical meetings, where they would be brought into contact with each other, profit by each other's experiences, discuss methods, and gain new inspiration and devotion for their work. By the central board there could be introduced into the system throughout the city methods of co-operation and co-ordination which would add to the efficiency of its administration; means of identification could be secured, which would prevent the repeated release by different courts of the same probationer; and the whole operation of the probation system, by being effectively systematized, would be made progressive.

In 1905, the legislature of New York created a commission to examine and report on the subject of probation. The following year, the commission, of which Mr. Homer Folks was chairman, made a most admirable and exhaustive report. To this report the present writer is indebted for the suggestion, just made, of a municipal probation board and also for a flood of light on many of the topics discussed in this chapter. The commission prepared and recommended for adoption a very carefully digested series of statutes covering the whole system of probation. The proposed municipal board for the city of New York was to consist of seven members appointed by the mayor, and it was recommended that they be selected from a list of fourteen candidates to be nominated by five designated charitable organizations. The commission also recommended the creation of a permanent state department of probation, which should investigate the proceedings of all municipal boards and of probation officers and inquire into their conduct and efficiency, make rules and

regulations regarding probation methods, collect statistical information as to the system and, in an annual report to the legislature, make suggestions or recommendations looking to the improvement and development of the probation system. It is cause for regret that the legislature of New York has thus far failed to adopt the comprehensive acts proposed by the commission; but in 1907, the legislature did enact a law creating a permanent state probation commission which was vested with substantially the same powers and duties that had been recommended in that behalf by the first mentioned commission. The state probation commission thus created consists of seven members, four of whom are appointed by the governor, two are designated, one by the state board of charities, and one by the state commission of prisons, and the remaining member is the commissioner of education *ex officio*. Very fortunately Mr. Folks is the president of this New York State Probation Commission, which is now doing most thorough and fruitful work. Permanent state boards of probation, with similar powers, have been created in several other states of the Union.

The probation system, in most of the states where it is established, has been introduced within the last decade, and is therefore a comparatively new feature in their jurisprudence. But it has stood the test of trial and, by constantly extending experience, its methods are being more fully developed and improved and its practical value is being more and more conclusively demonstrated. There is reasonable ground for hope that the wider adoption and progressive growth (which are confidently anticipated) of the two correlated institutions of probation and the juvenile court, may produce, in the not distant future, very striking results in the repression and reduction of crime in the United States.

CHAPTER VII

CRIMINAL PROCEDURE IN THE UNITED STATES

THE methods and forms of legal procedure in criminal prosecutions vary in the different states and, for that matter, even in different courts of the same state. But these variances are, for the most part, so far superficial and formal, that substantial uniformity in criminal procedure may be said to prevail throughout the Union. As illustrative of what may thus be termed American procedure, it may be useful to trace in detail the course of a criminal prosecution through its successive stages from its inception to the execution of final judgment. For this purpose, the system established in the state of New York has been selected, not merely because of the relative importance and prestige which that state has attained in the general field of jurisprudence, but because its legal codes have been widely adopted or followed in many of its sister states. For these reasons, it is thought that the system practised in New York will be found to be more nearly typical than any other, of the prevailing criminal procedure in the United States.

For minor offenses, the procedure is simple and summary; such cases are brought directly to trial and final judgment before inferior courts of criminal jurisdiction. They may, however, in some instances be removed from the inferior court and be prosecuted by indictment in a higher court upon the certificate of a judge of the higher court that such course is reasonable. When the trial is had in the inferior court, resulting in conviction, the defendant has the right of appeal only when allowed by a judge of a superior court.

For felonies and grave misdemeanors, the procedure is more complex and tortuous. The following condensed summary aims to set forth in outline the principal successive steps of a prosecution "by information and indictment."

THE INFORMATION

When an information is laid before a magistrate that a person has been guilty of some designated crime, the magistrate must examine on oath the informant and any witnesses he may produce,

taking their depositions in writing. If the magistrate is satisfied that a crime has been committed, and that there is reasonable cause to believe that the person accused has committed it, he must issue a warrant for the arrest of the person, directing that he (the defendant) be brought before him, or, if the offense was a misdemeanor committed in another town, before a magistrate of such town. The warrant, if issued by a magistrate of inferior criminal jurisdiction, can be executed within the county in which it is issued; if the defendant is in another county, the warrant can be executed there only upon the written direction of a magistrate of that county indorsed on the warrant. If issued by the judge of a court not of inferior jurisdiction, the warrant can be executed without further indorsement anywhere within the state.

THE ARREST

The officer receiving the warrant must arrest the defendant; the arrest can be made on any day and at any time of day or night, in case of a felony, but, in case of a misdemeanor, the arrest cannot be made on Sunday or at night, unless by special direction of the magistrate. The officer making the arrest must inform the defendant of the warrant and must show it to him, if required.

An arrest may also be made by an officer, or by a private person, without a warrant, for a crime committed or attempted in his presence, or when the person arrested has committed a felony, although not committed in the presence of the one making the arrest.

THE EXAMINATION

When the defendant is brought before the magistrate, the magistrate must inform him of the charge against him and of his right to the aid of legal counsel before any further proceedings, and must allow the defendant a reasonable time, and provide a messenger, to send for counsel. Upon the appearance of counsel or after waiting a reasonable time therefor, the magistrate must proceed to examine the case. He must first read to the defendant the depositions taken upon the original information, and must upon request summon the deponents (if within the county) for cross-examination, and must issue subpoenas for the attendance of any additional witnesses required by the prosecutor or the defendant. The defendant must be informed that he has the right to make a statement (to be reduced to writing) answering the charge and explaining the facts alleged against him, but that his failure to make such statement cannot be used against him on the trial. The testimony of all the witnesses

must be reduced to writing, be signed by the witnesses and be authenticated and certified by the magistrate. The depositions must be kept from the public, but the defendant is entitled to a copy of them.

DEFENDANT DISCHARGED OR "HELD TO ANSWER"

After hearing the proofs, if it appear to the magistrate either that a crime has not been committed or that there is not sufficient cause to believe the defendant guilty, the magistrate must discharge the defendant. On the other hand, if it appear from the examination that a crime has been committed, and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must indorse on the depositions an order that the defendant be "held to answer the same," and must commit the defendant to custody, unless bail is given in case the offense is a bailable one.

BAIL

The provisions relating to bail, at this stage, apply at all the subsequent stages of a criminal process down to the final conviction, and may be here stated once for all. The admission of the defendant to bail before conviction is a matter of right in cases of misdemeanor; in all other cases it is a matter resting in the discretion of the court. If the crime is one punishable with death, or such that, if death should ensue, the crime would be murder, bail can be allowed only by a justice of the Supreme Court. In lieu of a bondsman, the defendant may make a deposit of money with the county treasurer in the amount named in the order admitting him to bail. After conviction of a crime not punishable with death, and an appeal therefrom with stay of proceedings, the defendant may still be admitted to bail as a matter of right, if the appeal be from a judgment imposing a fine, and as a matter of discretion in all other cases. If the defendant fails to give bail or to deposit money in lieu thereof in any instance where it is allowed, he is, of course, committed and kept in custody.

DISPOSITION OF CASE FOR TRIAL

In certain cases where the offense is a minor misdemeanor the defendant can elect to be tried at once by a court of inferior jurisdiction. If he does not so elect, then in every case the magistrate must, within five days after the conclusion of the examination, transmit to the clerk of a court having power to inquire into offenses by the intervention of a grand jury, the warrant of arrest, all the

depositions, the statement of the defendant if any, and all undertakings given.

GRAND JURY

The case next comes before a grand jury, which proceeds to investigate the charge in secret session. A grand jury is appurtenant to, and subject to the direction of, a court of not inferior jurisdiction; and the code contains elaborate provisions governing the drawing, the summoning and the sessions of a grand jury, and regulating the conduct of its proceedings. The grand jury consists of not more than twenty-three, nor less than sixteen, members, of whom twelve only are required to concur in finding an indictment.

The depositions (and statement of the defendant) taken before the magistrate by whom the defendant was held to answer are submitted to the grand jury, who receive also the testimony of witnesses produced before them, as well as legal documentary evidence. The grand jury is not bound to hear evidence for the defendant; but it is their duty to weigh all the evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they should order such evidence to be produced; and, for that purpose, may require the district attorney to issue process for the witnesses. When all the evidence before them is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction of the defendant, it is the duty of the grand jury to find an indictment, which is defined as an accusation in writing, presented to the court, charging the defendant with a specified crime. The indictment must contain the title of the action, specifying the name of the court to which the indictment is presented, the names of the parties, and a plain and concise statement of the act constituting the crime, which crime must be one which was committed, or which is triable, within the jurisdiction of the court. And there must be indorsed upon it the names of the witnesses examined before the grand jury, and of those whose depositions have been read before them. The indictment, when completed, must be filed with the clerk of the court and must not be shown to any person (other than a public officer) until the defendant has been arrested or has appeared. If twelve grand jurors do not concur in finding an indictment, the depositions and statement transmitted to them must be returned to the court, with an indorsement that the charge is dismissed. The charge cannot then be again submitted to a grand jury, unless the court shall specially so direct.

ARRAIGNMENT OF THE DEFENDANT

When the indictment is filed, the defendant is brought before the court to answer; if the crime charged be a felony, he must appear in person; if it be a misdemeanor, he may appear by counsel. If the defendant appear without counsel, the court must, if desired by the defendant, assign counsel to act in his behalf. If the defendant fail to appear, or is absent when his personal attendance is necessary, the clerk of the court (acting upon the direction of the court or upon the application of the district attorney), or the district attorney himself, may issue a bench warrant for the arrest of the defendant.

The arraignment consists in stating to the defendant the charge in the indictment and asking him whether he pleads guilty or not guilty thereto. The defendant, for answer, may so plead, or he may move the court to set aside the indictment or may demur thereto.

The motion to set aside the indictment must be based upon alleged irregularities in the proceedings before the grand jury. If the motion is granted, the court may discharge the defendant, or direct that the case be resubmitted to the same or another grand jury, the defendant meantime remaining in custody. An order setting aside an indictment is no bar to a future prosecution for the same offense. If the motion is denied, the defendant must immediately plead or demur to the indictment.

ANSWER TO INDICTMENT

The defendant may demur to the indictment when it appears, upon its face, that the defendant ought not to be convicted, by reason of jurisdictional defects, or because the facts stated are legally insufficient to show that he has committed a crime. If the demurrer is allowed, the judgment is final and is a bar to another prosecution for the same offense, unless the court deems the objection on which the demurrer is based to be avoidable in a new indictment, and directs the case to be resubmitted to the same or another grand jury. If the demurrer is disallowed, the court permits the defendant to plead to the indictment. If he fails to plead, judgment is pronounced against him if the crime charged is a misdemeanor, otherwise a plea of "not guilty" must be entered.

The plea to an indictment may be "guilty" (of the crime charged or of any lesser crime) or "not guilty," or a plea of a former conviction or acquittal of the crime charged. But if the crime charged is one that may be punishable by death, a conviction cannot be had

upon a plea of guilty. The plea of guilty can be put in only by the defendant in person, and not by his counsel, except where the indictment is against a corporation. The plea of insanity may be presented as a specification under the plea of not guilty. If a defendant refuse to answer by either demurrer or plea, a plea of not guilty must be entered.

THE JURY

If an issue of fact has been raised, by a plea of not guilty or of a former conviction or acquittal of the same crime, the trial must be had by a jury. In securing a jury, objection may be made by the defendant to the entire list of those summoned to attend as jurors, on the ground of official irregularities in drawing or summoning them. If this objection is disallowed, individual jurors may be challenged. Objection may be made to a juror, without assigning any reason therefor; such "peremptory challenges" are allowed, where the crime is punishable with death, to the number of thirty; if punishable with imprisonment for life or for a term of ten or more years, to the number of twenty, and in all other cases to the number of five. Beside these peremptory challenges, challenges may be made without limit, on the ground that the juror has been convicted of felony, or is otherwise disqualified by law from serving as a juror, or upon the ground that the juror, from bias, prejudice or other special cause, cannot try the issue impartially. These "challenges for cause" are tried and determined by the court upon examination of the juror challenged and of other witnesses who may be called, and the first twelve persons who are approved or accepted are sworn and constitute the jury to try the issue. The law also provides for a "special jury" in peculiar cases.

THE TRIAL

If the indictment be for a felony, the defendant must be personally present at the trial; but if for a misdemeanor, the trial may be had in his absence, if he appear by counsel.

The trial is conducted in the following order of procedure:

The district attorney or counsel for the people opens the case, and offers the evidence in support of the indictment.

The defendant or his counsel opens the defense, and offers the evidence in support thereof.

The parties may then, respectively, offer rebutting testimony, but the court may in its discretion permit them to introduce additional evidence upon their original case.

When the evidence is concluded, the case may be submitted to the jury without argument, or, if the parties or either of them elect to present argument, the defendant or his counsel must begin, and the counsel for the people shall have the right to conclude the argument before the jury.

The court must then charge the jury.

The rules governing the admission of evidence in civil cases apply for the most part in criminal cases. The defendant may testify in his own behalf, but his neglect or refusal to do so shall create no presumption against him. A confession of the defendant is not sufficient to warrant his conviction without additional proof that the crime charged has been committed; nor can a conviction be had upon the uncorroborated testimony of an accomplice. If, at any time after the evidence on either side is closed, the court deem it insufficient to warrant a conviction, it may advise the jury to acquit the defendant, and they must follow the advice. The jurors may, at any time before the final submission of the cause, in the discretion of the court, be permitted to separate, or be kept in charge of proper officers, who shall be sworn to suffer no person to speak to or communicate with the jurors, nor to do so themselves, on any subject connected with the trial; and the jurors at each adjournment of the court must be admonished by the court not to converse among themselves on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted to them. Questions of law arising in the course of the trial must be decided by the court, and questions of fact by the jury, except that on the trial of an indictment for libel the jury have the right to determine the law and the fact.

At the close of the case, the jury, upon retiring for deliberation, may take with them notes of the testimony made by themselves, but none made by any other person; also (upon the consent of the court, the defendant and the counsel for the people), any paper or article that has been received in evidence. If the jury are unable to agree upon a verdict, the court may discharge them, and the case must be retried at the same or another term.

The defendant may take exceptions to decisions of the court upon matters of law by which his rights are prejudiced, in allowing or disallowing challenges to the jury, in admitting or rejecting witnesses or testimony, or in charging or instructing the jury, and may base an appeal upon such exceptions. (No corresponding right of exception or appeal is allowed to the counsel for the people.)

THE VERDICT

If the jury agree, their verdict may be either a general or a special one. A general verdict is one of "guilty" or "not guilty" or "for the people" or "for the defendant." A special verdict (which cannot be rendered, however, in case of libel) is one by which the jury find the facts only, setting them forth in detail in writing, and leaving the judgment to the court. If the crime is one consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, but guilty of an inferior degree, or of an attempt to commit the crime. Upon a trial for murder or manslaughter, if the act complained of is not proved to be the cause of death, the defendant may be convicted of assault. A conviction on a charge of assault does not bar a subsequent prosecution for murder or manslaughter, if the person assaulted die after the conviction, in case death results from the injury caused by the assault. In all other cases, the defendant may be found guilty of any crime, the commission of which is necessarily included in the one charged in the indictment. Where there is a verdict of conviction which seems to the court to be based upon a misapprehension of the law by the jury, the court may instruct the jury further upon the law and direct them to reconsider their verdict; if, after reconsideration, the jury return the same verdict, it must be entered. But when the verdict is one of acquittal, the court cannot require the jury to reconsider it. If the defense is insanity of the defendant, the jury must be instructed, if they acquit him on that ground, to state the fact with their verdict; in such case, the court must, if it deem the defendant's discharge dangerous to the public peace or safety, order him to be committed to the state lunatic asylum until he becomes sane.

INSANITY OF DEFENDANT

When a defendant pleads insanity, the court, instead of proceeding with the trial, may appoint a commission to examine him and report as to his sanity at the time when he committed the crime. If a defendant, while in confinement under indictment, at any time before or after conviction, appear to be insane, the court may appoint a similar commission to report as to his sanity at the time of their examination. The commission must examine the defendant, and may call and examine witnesses; they must be attended by the district attorney, and the counsel for the defendant may take part in the proceedings. If the commission find the defendant insane, the

trial or judgment must be suspended until he becomes sane; and the court, if it deem his discharge dangerous to the public, must order that he be, meantime, committed by the sheriff to a lunatic asylum, there to be detained until he becomes sane. When he becomes sane, the superintendent of the asylum must give notice of the fact to a judge of the court, who must require the sheriff to bring the defendant from the asylum and keep him in custody until he is brought to trial, judgment or execution, as the case may be, or until he is legally discharged.

PROCEEDINGS AFTER VERDICT AND BEFORE JUDGMENT

The defendant may move for a new trial on the ground of defects or errors in the proceedings during the trial, on the ground that the verdict is contrary to law or against the evidence, or on the ground of newly discovered evidence. If based on the ground last mentioned, the motion may be made at any time within one year, or, in case of sentence of death, at any time before execution. If a new trial is granted, all the testimony must be produced anew, and the former verdict cannot be used or referred to, either in evidence or in argument.

The defendant may also make an application that no judgment be entered, by reason of lack of jurisdiction in the court, or that the facts stated do not constitute a crime. If the application is granted, and it appears that there is not evidence sufficient to convict the defendant of any crime, he must be discharged and acquitted of the charge in the indictment. But if there is reasonable ground to believe the defendant might be found guilty upon a new indictment properly framed, he may be recommitted to answer such new indictment; and if there is reasonable ground to believe him guilty of another crime, he must be held to answer therefor.

THE JUDGMENT

When judgment is rendered, the defendant must be present, if the conviction be for a felony, but if for a misdemeanor, judgment may be pronounced in his absence.

When the defendant is arraigned for judgment, he must be asked by the clerk whether he has any legal cause to show why judgment should not be pronounced against him. He may show cause and make motion either for arrest of judgment or for a new trial, whereupon the court shall proceed to decide upon such motion; or the defendant may aver that he is insane, and if the court thinks

there is reasonable ground for believing him to be insane, the question of his insanity must be tried by a commission (as herein above set forth). If the defendant be found to be sane, judgment must be pronounced; but if found insane, he must be committed to the state lunatic asylum until he becomes sane; and when notice is given of that fact, he must be brought before the court for judgment.

If no sufficient cause appear to the court why judgment should not be pronounced, it must thereupon be rendered.

PROBATION

After a plea or verdict of guilty in a case where the court has a discretion as to the extent of the punishment, if it appears to the court that there are mitigating circumstances, the court has the power to place the defendant in charge of a probation officer. In such case, the court may suspend sentence, upon such terms and conditions as it shall impose, from time to time, or, if judgment is rendered requiring defendant to pay a fine or to be imprisoned until it is paid, the court upon imposing sentence may suspend its execution for such time and upon such terms as it shall determine, provided that, upon payment of the fine, the judgment shall be satisfied and the probation cease. The probation may in every case be revoked and terminated by the court at any time, and the sentence which had been suspended may be pronounced at any time before the expiration of the longest period for which the defendant might have been sentenced, and the execution of the judgment may be enforced for its unexpired term.

APPEALS

An appeal to the appellate division of the Supreme Court may be taken by the people only from a judgment sustaining defendant's demurrer to the indictment and from an order arresting a judgment of conviction. An appeal can be taken by the defendant from a judgment of conviction; such appeal must be taken to the said appellate division, except that, when the judgment is of death, the appeal is made directly to the Court of Appeals and, upon the appeal, every decision of the court in any intermediate order or proceeding may be reviewed. A further appeal may be taken from the appellate division to the Court of Appeals from a judgment affirming or reversing (1) a judgment of conviction or (2) a judgment sustaining a demurrer to an indictment or (3) an order arresting judgment, and from a final determination affecting a substantial right of defendant. These appeals

are matters of right, and must be taken within one year after the judgment or order appealed from.

An appeal by the people does not stay or affect the operation of a judgment in defendant's favor until the judgment is reversed. An appeal by defendant to the appellate division stays the execution of the judgment or determination appealed from only upon a certificate signed by the judge who presided at the trial or by a justice of the Supreme Court that in his opinion there is reasonable doubt whether the judgment should stand. The appellate court in any case and the Court of Appeals when the judgment is of death, may order a new trial, if it is satisfied that the verdict against the defendant was against the weight of evidence or against law, or that justice requires a new trial, whether exceptions have been taken or not. The defendant's appeal to the Court of Appeals stays execution only upon a like certificate by a judge of that court or of the appellate division, except that, when the judgment is of death, the appeal alone effects a stay.

The court must give judgment upon the appeal without regard to technical errors or defects or to exceptions not affecting substantial rights. The court may correct an erroneous judgment to conform to the verdict or finding, and, in case of reversal, may order a new trial which must proceed in all respects as if no trial had been had.

The course thus briefly traced, certainly presents a long and devious path for a prosecuting officer to tread without making a single misstep. At the trial, especially, the examination of witnesses, when opposed by an alert advocate on the part of the defendant, gives rise to endless rulings and exceptions relating to the admission of testimony. It is a severe test of the skill of a prosecuting attorney and of the astuteness of a presiding judge to conduct a criminal prosecution to its end without committing any reversible error.

The procedure, in its main features, is based upon the Common Law, which is generally regarded as invested with a certain degree of sanctity. But it must be remembered that the Common Law system of criminal procedure was developed in turbulent times, when the people of England were struggling to protect their liberty against encroachments by the crown, when courts and judges, who held their office by royal appointment, were corrupt; when the machinery of the criminal law was often used oppressively to compass political

ends and to further despotic measures; in times, too, when crime was widely prevalent throughout the country and the punishments of crime were excessively severe and merciless, all felonies being punishable by death. It followed inevitably that the current of popular sympathy ran strongly for the prisoner at the bar. And it is not at all surprising that the forms of criminal procedure came to be so moulded by the Common Law as to throw every safeguard around the person accused of crime. Not only was he presumed to be innocent, but throughout the prosecution he was awarded certain positive advantages over the prosecutor, which were designed to preclude the possibility of a conviction, if the prisoner were indeed innocent in fact.

The danger of oppression by the sovereign power, which gave rise to this complicated procedure, is now a thing of the past; at the present time the danger lies not in over-zealous prosecution, but in the escape of the guilty from conviction. The scheme of procedure is far too elaborate and complex; it greatly needs to be simplified and abbreviated.

The successive steps leading from the original charge to the final judgment afford the prisoner three distinct opportunities to escape prosecution. There are virtually three trials. First, upon the preliminary examination, all the evidence on both sides can be produced; the prisoner, aided by legal counsel and confronted with the witnesses against him, can cross-examine those witnesses and can produce all the counter-evidence at his command to establish his innocence. If he succeeds in convincing the committing magistrate that the charge has not been sustained, he obtains his immediate release and the prosecution ends; if, on the contrary, the magistrate is convinced that the prisoner is guilty, the proceeding has no corresponding finality for the prosecution. The prisoner is then committed for a second trial before the grand jury. Here again the testimony is reviewed, and further evidence can be adduced at the discretion of the grand jury; and here, as in the former trial, if the grand jury deem the charge unsustained, the prisoner gains his discharge, but, if the decision is adverse to the prisoner, he is committed for his third and final trial. In both the first trial before the committing magistrate and in the second trial before the grand jury a decision in favor of the prisoner is final (subject, in both cases, to a renewal of the prosecution by the district attorney); but a decision in favor of the prosecution has only the effect of granting a further trial.

It is difficult to understand why the forms of criminal procedure

should differ so widely from the procedure in civil actions. A civil suit, at law or in equity, though it may involve many million dollars, is heard and decided, once for all, in a single trial. No civil case (except an action of ejectment and proceeding for probate of a will) can have a second trial, as of course. Why should a criminal case be subjected to so different a regimen? It would seem that, in the series of proceedings leading up to conviction, at least the second hearing, that before the grand jury, could well be eliminated. The intervention of the grand jury between the committing magistrate and the trial court serves no perceptible purpose that is either necessary or useful.

In practice, the chain of procedure is often abbreviated by cutting off the first link instead of dropping out the second one. The accusation of crime may be brought in the first instance, not before a committing magistrate but directly before the grand jury. But this practice gives rise to a positive and grave objection to the institution of the grand jury, as now constituted. When the original charge is laid before the committing magistrate, the accused person (as we have seen) is immediately summoned, he has the aid of legal counsel, he hears and cross-examines the witnesses against him, he has every opportunity to understand and to defeat the charge brought against him. The procedure before the grand jury may be widely different from this; its proceedings are secret, they may be conducted without the knowledge of the defendant and may result, upon strictly *ex parte* evidence, in an indictment charging the defendant with grave crime. Here are the possibilities of cruel injustice: groundless charges brought maliciously and supported by false testimony, a secret hearing and a final indictment, the first intimation of which comes to the innocent victim when he is thrown into prison with the certainty before him of a public trial. It all sounds like a happening from the middle ages, and yet it may possibly be the real experience of any resident of a state where the grand jury sits in secret with its present powers. No man (unless he be in hiding or otherwise inaccessible) ought to be subject to the public disgrace and brand of an actual indictment for crime, without having had opportunity to know what crime is laid to his charge, and by whom, and to assert his innocence. An indictment, in popular estimation, overthrows the presumption of innocence and creates a presumption of guilt; and when an innocent person is publicly indicted for crime, his reputation receives a stain which fades, but cannot be wholly effaced, by his subsequent trial and acquittal.

There are those who have urged the abolition of the grand jury as an outworn relic of medievalism. But there are times and occasions when the grand jury serves a most useful purpose in attacking public evils and in awakening the public conscience. Moreover, it sometimes enters upon investigations that must be conducted secretly to be effective. But its procedure in the investigation at first instance of a criminal charge should be radically altered and made to conform more closely to that now applicable to a committing magistrate. The person accused, if he is within reach, should be brought before the grand jury and allowed the fullest opportunity to refute the charge preferred against him. If he has absconded or cannot be found, the incriminating evidence should be received, and, if it justifies an indictment, an indictment should be found; but when the defendant returns or is brought again within the jurisdiction of the court, he should be produced before the grand jury then sitting, which should be invested with power to rehear the case, affording the defendant ample opportunity of exculpation, and with power upon such rehearing to either vacate or reaffirm the prior indictment or to find a new indictment. In this manner, every defendant would have a chance to establish his innocence before he could be brought to trial upon an indictment.

There are other features of the criminal procedure that are in sharp contrast with the practice in civil cases; and every such deviation from civil procedure secures an advantage to the defendant which in a civil suit would be regarded as repugnant to justice. In a criminal trial the defendant cannot be compelled to testify upon the facts in issue, and his refusal is held to create no presumption against him; in a civil action, a defendant who refused to testify on the ground that his evidence might aid the plaintiff's case would be apt to occasion some hilarity, ending in his commitment to prison for contempt of court.

In a criminal case, if the defendant's witnesses reside outside of the state, he is entitled to have their testimony taken on commission and admitted on the trial. The prosecution may join in such commission, and examine in support of the indictment other witnesses who happen to be within the state or country to which the commission is issued. But no right to the issuance of a commission is accorded to the prosecutor, who (with the exception just mentioned) is confined to the testimony of such witnesses only as are within the jurisdiction of the state and can be produced in person before the court. This rule gives a most unfair advantage to the defendant,

whose witnesses are generally friendly to him and willing to appear in his behalf, while the witnesses for the state are often reluctant to testify and seek to evade the duty (and perhaps the danger) of appearing against the defendant. There is a provision in the Constitution of the United States, that in all criminal trials the accused shall have the right "to be confronted with the witnesses against him." This applies only to trials in the federal courts, but the same provision has been adopted in many of the states by constitutional or statutory enactment. "Confrontation" has been uniformly interpreted as meaning the personal attendance of the witnesses in the presence of the accused, but the requirement of such personal attendance extends only to the witnesses *against* the prisoner, not to those in his favor. The Common Law required the personal attendance of the witnesses against the defendant, but it also required the personal attendance of the defendant's witnesses as well. By the existing American system, the state may be deprived of the evidence of every witness who is beyond the reach of its territorial jurisdiction, while the prisoner has the unlimited power to secure by commission and to introduce in evidence, the testimony of absent witnesses from the ends of the earth—of witnesses who may, perhaps, have departed from the state for the express purpose of avoiding the necessity of attending in person at the trial and undergoing a searching cross-examination which might result in their immediate arrest on the charge of perjury or other crime. It may well be seriously questioned whether the existing system does in this regard serve the ends of justice or yield adequate protection to the state in the contest against crime.

A still more striking instance of partiality toward the prisoner appears in the procedure relating to appeals. For every error of law occurring during the entire course of the proceeding from the empanelling of the grand jury to the final conviction, for every erroneous ruling of the court upon the admission or rejection of evidence or upon the allowance or disallowance of challenges or upon the decision of any motion or demurrer, the defendant has an unlimited right of appeal. On the other hand, the right of the people to appeal is most rigidly restricted. From a judgment of acquittal there is absolutely no appeal in any case; though the acquittal was the immediate result of grave legal error committed by the judge in the rejection or admission of testimony, the state is powerless to have such error reviewed or corrected. Indeed, the only instance in which the state has any right to appeal from any decision or action of the trial

court favorable to the defendant, is where the court has sustained defendant's demurrer to the indictment. There are only two other cases in which the state is allowed the right of appeal at all; it can appeal from an order arresting a judgment of conviction and from a judgment reversing a judgment of conviction. Against this meagre allowance to the state of power to correct legal errors by appeal, the code, after giving to the defendant unlimited rights of exception and appeal at every step in the proceedings, contains this final provision, as if to emphasize the discrimination in his favor:

> The appellate court may order a new trial if it be satisfied that the verdict against the prisoner was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below.

But what if the verdict was *in favor* of the prisoner, but was against the weight of evidence or against law, and justice requires a new trial? The appellate court cannot then grant a new trial, because the code provides no means of bringing such a case before the appellate court. But take the solitary case in which the state is allowed to appeal from a judgment in favor of the prisoner; that is, a judgment sustaining his demurrer to the indictment. Suppose the appellate court is of the opinion that the demurrer ought to be sustained, but that the objection on which the demurrer was based might be avoided in a new indictment. In such a case, the code contains no section giving the appellate court power to direct the resubmission of the case to the grand jury.

The unrestricted right of appeal on the part of the prisoner given, and almost encouraged, by the codes has proved a very serious evil in this country. Successive appeals, devoid of merit, are taken, partly to gain time and partly in the hope of succeeding on some sheer technicality, which involve heavy expense to the state, yield encouragement to criminals, and scandalously delay the execution of justice. This evil has been intensified many-fold by the fact that such appeals have sometimes resulted in the discharge of the prisoner, where the appellate court has been controlled by its zeal to condemn legal errors, that really occurred in the course of the proceedings, rather than to show, by a broad view of the entire case, that such errors did not materially affect the final result. It is an axiom that the value of a penal system depends largely upon the certainty and the celerity with which crime is followed by conviction and execution

of the sentence. The unlimited right of appeal given to the prisoner is opposed to this certainty and celerity An amended system seems quite practicable, by which an appeal should be allowed only upon a certificate by the judge who tried the case or a judge of a supreme court that there is reasonable doubt whether the result reached at the trial is not against law, or whether justice does not require a new trial. And there is no perceptible reason why, upon such a certificate, an appeal should not be allowed to the state as well as to the prisoner.

All criminal laws exist for the protection of the people. The life of the state, the safety of the individual and the very preservation of civilization itself are all conditioned upon the repression of crime. The enforcement of the criminal law is so vitally imperative that a criminal trial involves issues that are really momentous. It is not the fate of the individual prisoner only that is to be determined; the necessity that crime should be condemned, in the interest of the whole people, presents a paramount issue at stake in the trial. It is quite as important that the prisoner, if guilty, should receive condemnation, as it is that the prisoner, if innocent, should not suffer punishment. The common saying, that it is better that the guilty should be acquitted than that one innocent person should be condemned, embodies a theory that finds abundant expression in the codes of criminal procedure. The saying may be true, if the trial is regarded as affecting nothing but the individual destiny of the prisoner. But a criminal trial involves a much larger issue. The right of the people to protection against crime is quite as important as the right of the prisoner to a fair trial. Any system of criminal procedure that guards the right of the prisoner more sedulously than the right of the people, which secures to the prisoner facilities and advantages that it denies to the people, is a radically defective system.

Such a system diminishes public respect for law and emboldens crime. The difficulty in obtaining legal evidence of crime, with which the state is hampered, the legal technicalities and the right to secure testimony from absent witnesses, the rights of exception and appeal, all placed at the disposal of the prisoner and withheld from the state, the long delays and the uncertainty of the final result; these facts tend to create in the public mind a distrust of existing criminal procedure and cause it to be regarded as an ineffective and inadequate means of crushing crime. This distrust is the direct cause of the lynchings and the riotous outbreaks that are the disgrace, and almost the distinctive disgrace, of this country.

These express the popular contempt for a legal system that exhibits more zeal in protecting the prisoner than in protecting the public.

The ideal system of procedure is one that dispenses even-handed justice, that acts directly and simply, without cumbrous machinery, and that reaches results with certainty and celerity.

Before concluding this chapter, there remains a branch of criminal procedure of grave importance, regarding which the provisions of the code already cited are very meagre and inadequate; namely,

THE DEFENSE OF INSANITY

This defense assumes special importance because it is apt to be interposed, as the only possible defense, to crimes peculiarly atrocious. The very enormity of these crimes seems to indicate something inhuman and abnormal in the perpetrator that gives plausibility to the plea of insanity. In such case, as already stated, the New York Code of Criminal Procedure empowers the court to appoint a commission to report as to the sanity of the defendant when he committed the crime. If the commission reports that the defendant was insane at the time of the commission of the crime, the code is silent as to what action the court is to take with reference to the report or with reference to the defendant. It may be inferred, however, that in such case the execution of the commission takes the place of a trial; for the section which empowers the court to appoint the commission declares that the court may make such appointment "instead of proceeding with the trial of the indictment." The power to appoint is permissive and not mandatory, and as a matter of actual practice it is seldom used; ordinarily, the jury at the trial passes upon the insanity of the defendant as upon any other defense interposed. This is a serious wrong, because a jury drawn by lot from the common people is wholly incompetent to decide the issue intelligently. The question of sanity or insanity admits of no satisfactory solution except by scientific diagnosis. In many cases, the defendant stands near the border line between the two, where a correct judgment can be formed only by an experienced and highly trained alienist. The question is admitted to be one that must be decided by expert testimony, and so a number of so-called experts are produced as witnesses, those on the part of the prosecution asserting the sanity and those on the part of the defense asserting the insanity of the defendant. But the bewildered jury is probably more unable to decide intelligently between the experts than it is to decide the main issue of sanity or insanity without any expert testimony at all. The rudi-

mentary principle in jury trials that the jury cannot pass upon questions of *law* is based on the fact that law is a science, but the question of sanity is not less scientific and is often as involved and difficult as any question of law.

This opens the whole difficult subject of expert testimony. Among the suggestions that have been made toward its solution, one that has been largely advocated calls for the selection and appointment of expert alienists as public officials who shall alone be called as expert witnesses upon the issue of sanity or insanity; but whether the suggestion can constitutionally be carried into effect demands careful consideration. There appears, however, no room for doubt that some method ought to be devised which shall take away from the common jury the function of determining the defendant's sanity or insanity and which shall commit the decision of that issue to a tribunal which is competent to treat it as a scientific question and to render a judgment that shall be final and conclusive.

A commission *de lunatico*, according to the prevailing practice, is composed of three commissioners (two of whom are usually a lawyer and a physician) appointed by the court and a sheriff's jury of not less than twelve nor more than twenty-four members. The same objection applies to this commission as to the ordinary trial-jury; the tribunal does not possess knowledge or experience to deal with an issue that lies in the domain of psychological and of physiological science and demands the education and practiced insight of the professional alienist.

The following plan is here proposed for meeting the plea of insanity. The first step should be a trial of the issue thus raised, to be had before the court and a special jury, the latter to consist of educated alienists only, who should be selected by a method analogous to that used to obtain a "struck jury." It is not necessary nor practicable that this jury should have twelve members; a much smaller number, perhaps five or even three, would be quite sufficient. This deviation from the traditional number of jurors (recommended for convenience) could not be made in those states the constitution of which requires a Common Law jury of twelve, without constitutional amendment. The constitutions of some of the states now provide for juries of eight, and even of four, members. The provision for jury trials contained in the United States Constitution requires a jury of twelve as at Common Law, but it applies to the federal courts only and places no restriction upon the power of a state to regulate the size of its own juries. The court and jury thus constituted, after

examining the defendant and receiving such testimony bearing upon his sanity as might be offered by either party, should determine whether defendant was insane to a degree rendering him irresponsible for his acts at the time of committing the crime charged and also at the time of the trial before them. The judgment rendered should be final and conclusive, subject to an appeal upon errors of law if allowed by a judge of a court of general jurisdiction. The results arrived at by such a trial and the subsequent proceedings would classify themselves under four distinct headings.

1. If the defendant was insane when the crime was committed and is still insane, the judgment would forthwith commit him to an asylum. In case he should in the future become sane, he should not be released without a further trial, before a court similarly constituted, to determine whether his condition, mentally and morally, is such that his restoration to freedom would be consistent with "public peace and safety."

2. If the defendant was insane when the crime was committed but is now sane, the judgment would further determine whether his present condition is so entirely sane and normal that he can with safety to the public and himself be set at liberty; and if not, the judgment would forthwith commit him to a sanitarium or other suitable institution for treatment and observation until he could safely be discharged. In this as in the preceding case, the defendant would be forever exempt from a criminal prosecution for the crime in question.

3. If the defendant was sane when the crime was committed and is now sane, the judgment would direct that he be forthwith brought to trial before a criminal court and common jury, where the claim of insanity should be rigidly excluded.

4. If the defendant was sane when the crime was committed but is now insane, the judgment would forthwith commit him to an insane asylum where he should remain until he becomes sane; if he regains his sanity, he is then to be tried criminally with the same force and effect as if he had never been insane.

INDEX

INDEX

Admirality and Maritime Jurisdiction, 24

Answer to Indictment, 98

Anti-trust Law, 13, 30

Appeals (in Criminal Procedure), 103, 108

Arraignment, 98

Arrest, 95

Articles of Confederation between the thirteen Original States, 2

Atonement for Crime, 61

Attainder, 11

Average Sentences, 40

Bail, 96

Baker, F. M.: Trial for bigamy, 43

Bertillon System, 53

Bigamy and Divorce Laws, 43

Capital Punishment: United States penal code of 1909, 22

Children's Courts: Child labor and truancy laws, relation to, 84; Children's courts and probation officers (Eugene Smith), 75; Court of equity, 82; Denver juvenile court, communication with public schools, 85; Dependent and neglected children, jurisdiction over, 83; Exceptional qualifications required in judges, 83; Illinois juvenile court law, 78; Lindsey, B. B., rare personal qualities, 85; Prevention of crime by juvenile courts, 81; Separation from other courts, 84. See also *Juvenile Delinquents*

Common Law of England: Accessories and principles, rule, 22; Age limit for capability of crime, 75; Criminal procedure, 104; Dealings with delinquent children, 77; Influence on federal and state penal codes, 3, 4, 16, 27; Interpretation of statutes, 33

Complexity of Criminal Procedure, 105

Constitution of the United States; adoption, 2

Continental Congress, 2

Crime: Increase of, 56, 64; Prevention of—Prevention of crime by juvenile courts, 81

Criminal Insanity: Defence of insanity, 101, 111

Criminal Statistics: Imperfect compilation in the United States, 55

Davis Murder Trial, 28

Definitions of Crimes, 59

Denver (Col.) Juvenile Courts, 85

Detection of Criminals, 53

Discharged Prisoners: Small percentage of reformations, 64

Disposition of Case for Trial, 96

District of Columbia: Cession of territory by Maryland, 15; Government, 12

Divorce and Bigamy Laws, 43

Dual System of Government in the United States, 3, 6, 27

English Colonies in North America, 1

Evidence: Rules of, 100

Examination (in Criminal Procedure), 95

Expert Testimony, 112

Extradition between States, 11, 54

Factors in a True Estimate of Guilt, 60

Farm Work by Convicts, 52

Fassett Law (Prison Labor), 49

Federal Courts, 14

FEDERAL CRIMINAL LAW, 14

FEDERAL GOVERNMENT AND THE SEVERAL STATES: Relations between, 1

FEDERAL PENAL CODE, 17, 18, 20

FINGER PRINT SYSTEM, 53

GRAND JURY: Composition and duties, 97; Objections to secret sessions, 106

GUILT: True estimate of, 60, 62

"HELD TO ANSWER" (IN CRIMINAL PROCEDURE), 95

IDENTIFICATION OF CRIMINALS, 53

ILLINOIS: Indeterminate sentence law, 73; Juvenile court law, 78

IMPEACHMENTS, 10

INCREASE OF CRIME, 56, 64

INDETERMINATE SENTENCE: Absolute indeterminate sentence not yet tested, 74; Capital crimes, non-applicability, 69; Constitutionality of laws, 73; Danger of premature adoption, 72; Definition, 67; Federal prisoners debarred, 23; Petty misdemeanors, 70; Recent origin, 71; Smith, Eugene, "The indeterminate sentence," 65

INDICTMENTS, 97, 98, 106

INEBRIETY: Treatment of, 70

INFORMATION (IN CRIMINAL PROCEDURE), 94

INJUSTICE OF MANY ASSUMPTIONS IN PENAL CODES, 59

INTER-STATE COMMERCE LAW, 13, 27, 35

ITALY: Controversy with the United States over New Orleans incident, 5

JAPANESE SUBJECTS IN SAN FRANCISCO, 9

JUDGMENT (IN CRIMINAL PROCEDURE), 102

JURY, 97, 101, 106

JUVENILE COURTS. See *Children's Courts*

JUVENILE DELINQUENTS: Age limit, 75, 80; Confinement of children in jails, 77; Medical treatment, 85; Moral sense, slow development of, 77. See also *Children's Courts; Probation*

LABOR: Competition with free labor, 46; Contract system—Abolition in New York, 48; Farm work, 52; Fassett law, 49; "Hard labor" in federal penal code, 22; Hostility of labor unions, 45; Lease system, 47. New York—Legislation, 47; Public account system, 48. Road-making, 52

LINDSEY, BEN B.: Exceptional qualities as judge of children's court, 85

LIVINGSTON, EDWARD: United States penal code, 21

MASSACHUSETTS: Probation laws, 87

MICHIGAN: Indeterminate sentence law, 73

NEAGLE MURDER TRIAL, 29

NEW ORLEANS (LA.): Murder of Italians by mob, 5

NEW YORK: Prison labor legislation, 47; Probation commissions, 92, 93

PARENTAL RESPONSIBILITY, 80, 82

PAROLE AND PROBATION: Distinction between, 88

PROBATION: Central board in cities, 92; Children's court and probation officers (Eugene Smith), 75; Expenditures for relief of probationers, 89; Massachusetts laws, 87; New York probation commissions, 92, 93. Officers—Appointment, 91; Civil service examinations, 91; Duties, 87; Qualifications, 89; Volunteer and salaried officers, 90. Parole and probation, distinction between, 90; Power of court to suspend sentence, 103; Suspension of sentence without supervision, 86

PROCEDURE IN CRIMINAL CASES, 94

PROCEEDINGS AFTER VERDICT AND BEFORE JUDGMENT, 102

PUBLIC PROTECTION: Rightful object of criminal law, 65

PUNISHMENT: Theories, 57, 65

PUNITIVE SYSTEM OF CRIMINAL LAW, 57

REFORMATION: Modern system of reformatory treatment, 66

RESPONSIBILITY: Parental responsibility, 80, 82

RETRIBUTIVE THEORY OF PUNISHMENT, 57, 65

ROAD-MAKING BY CONVICTS, 52

SAN FRANCISCO (CAL.): Treatment of Japanese subjects, 9

SENTENCE: Length of—Average sentences, 40; Unfair and unequal sentences, 63; Varying penalties in different states, 39

SMITH, EUGENE: "Criminal law in the United States", 1–113

STATE CRIMINAL LAW, 38

SUPREME COURT OF THE UNITED STATES, 15

TREASON, 11

TREATY OBLIGATIONS: Enforcement of, 5–10

TRIAL BY JURY, 11

TRIALS: Conduct of, 99

UNITED STATES CONSTITUTION: Adoption, etc., 2

UNITED STATES CRIMINAL LAW: Act of 1866, enactment and re-enactment, 19; Anti-Trust law, 30; Attainder, 11; Common law of England, influence of, 3, 4, 16, 22, 27, 33, 75, 104; Congress, powers of, 27; Counterfeiting foreign securities, 5; "Crimes Act" of 1790 and 1825, 17; Criminal law within federal jurisdiction, 14; Criminal law within the jurisdiction of the states, 38; Criminal statutes enacted by Congress, 4; Detection of criminals, 53; Divorce and bigamy, 43; Dual nature of government, 3, 6, 27; Extradition between states, 11, 54; Federal and state governments, relations between, 3, 12; Federal courts, 4; Federal penal codes, 17, 18, 20; General federal legislation, 26; Impeachments, 11; Inter-State Commerce law, 13, 27, 35. Jurisdiction —Admiralty and maritime, 24; Concurrent, of the nation and the states, 24, 28; Exclusive, of the nation, 15, 16; Federal jurisdiction in general, 10, 12. Livingston, Edward, penal code, 21; Local legislation, 15; Penal provisions in civil laws, 27; Punitive system of criminal law, 57; Smith, Eugene, "Criminal law in the United States," 1–113; State codes, wide differences, 38; Statistics, imperfect compilation, 55; Supreme Court, 15; Treason, 11; Treaty obligations, enforcement of, 5–10; Trial by jury, 11

UNITED STATES CRIMINAL PROCEDURE: Answer to indictment, 98; Appeals, 103, 108; Arraignment, 98; Common Law system, 104; Complexity of scheme, 105; Contrast with civil procedure, 107; Difficulty in securing convictions, 110; Disposition of case for trial, 96; Evidence, 100; Expert testimony, 112; Grand jury, 97, 106; Indictments, 87, 98, 106; Insanity as a defence, 101, 111; Judgment, 102; Jury, 97, 99, 101, 106; Partiality toward the prisoner, 107; Proceedings after verdict and before judgment, 102; Trials, conduct of, 99; Verdict, 101

UNITED STATES SUPREME COURT, 15

VERDICT (IN CRIMINAL PROCEDURE), 101

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